For Opinion See 90 S.Ct. 506 , 90 S.Ct. 171

U.S., 2004.

Supreme Court of the United States.
David Earl GUTKNECHT, Petitioner,
v.
United States of America, Respondent.
No. 71.
October Term, 1969.
July 28, 1969.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

Brief for Petitioner

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***1** Opinions Below.

The decision of the court of appeals is reported at 406 F. 2d 494 (8th Cir. 1969). The findings and conclusions of the district court are reported at 283 F. Supp. 945 (D. Minn. 1968).

Jurisdiction.

The judgment of the court of appeals was entered January 20, 1969. On February 11, 1969, Mr. Justice White entered an order extending the time for filing the petition for certiorari to and including March 21, 1969. The petition for certiorari was filed March 19, 1969, and certiorari granted April 28, 1969. This Court has jurisdiction under 28 U.S.C. § 1254(1).

***2** Statutes and Regulations Involved.

The statutes and regulations involved, set forth in full in Appendix A, *infra,* are: U.S. Const., amendment 1 (free speech clause), U.S. Const., amendment 5 (due process clause), U.S. Const., amendment 6, Military Selective Service Act of 1967, §§ 5(a), 6(h)(1), 12(a), 12(b)(6), 50 U.S.C. App. §§ 455(a), 456(h)(1), 462-(a), 462(b)(6), 32 C.F.R. §§ 1602.4, 1642.1-.46. In addition to the foregoing, a directive of the Director of Selective Service is reprinted as Appendix B, *infra.*

Questions Presented.

1. Whether the Selective Service delinquency provisions, providing for discretionary stripping of their deferments or exemptions and priority induction of those whom the local draft board believes have failed to perform any "duty" under the selective service law and regulations, are invalid on their face and as applied to one who in peaceable opposition to the war in Vietnam turned in his selective service registration certificate and notice of classification, in that:

a. they constitute a system of sanctions exercised without a Congressional delegation of the power to sanction;

b. if authorized by Congress, the delegation is void for vagueness in that it is "so unguided as to be unguiding;"

c. the delinquency regulations are void for vagueness;

d. the delinquency regulations deny procedural due process of law;

***3** e. the delinquency regulations, as interpreted and authorized to be applied in a directive from the Director of Selective Service, visit upon local boards a roving commission to punish registrants for the peaceable exercise of first amendment rights;

f. the delinquency regulations were improperly applied in this case, in that Congress has not authorized their use to order a registrant for priority induction in violation of his statutory right and in that the petitioner did not fail to perform a "duty" within the meaning of the regulations.

2. Whether the evidence sustains the charge in the indictment that petitioner failed "to report for and submit to induction," when he concededly reported and was never given the opportunity to submit, or whether, on the other hand, there was a fatal variance between the indictment and the government's proof.

3. Whether the indictment, charging in one count both a failure to report for and a failure to submit to induction, is duplicitous and fails to state an offense against the United States.

Statement of the Case.

Petitioner, a 20-year-old young man who faces a term of four years imprisonment, registered with Selective Service Local Board No. 115, Gaylord, Minnesota, on December 20, 1965, a few days after his eighteenth birthday. He was classified I-A on February 15, 1966, and reclassified II-S (student) on March 15, 1966. On June 21, *1967* petitioner was again classified I-A after he had notified his Local Board, by letter dated May 15, 1967, that he was no longer a student.

***4** On November 23, 1966, petitioner had filed an application with his Local Board for exemption as a conscientious objector under Section 6(j) of the Universal Military Service and Training Act (subsequently renamed the Military Selective Service Act of 1967). The application for conscientious objector status was denied by the Local Board on June 21, 1967, and petitioner duly noted his appeal to the State appeal board on July 20, 1967.

On October 16, 1967, as part of a nation-wide protest against the war in Vietnam, petitioner surrendered his Registration Certificate (SSS Form 2) and Notice of Classification (SSS Form 110) by leaving them on the steps of the Federal Building in Minneapolis with a statement explaining the basis of his protest (Appendix, pp. 42-43)[FN1] On the same date petitioner's Registration Certificate and Notice of Classification were sent to the Minnesota State Director of Selective Service, and on the following day were sent to the Minneapolis office of the Federal Bureau of Investigation at its request (Appendix, pp. 4043).

FN1. Citations to "Appendix" refer to the Appendix required by this Court's Rule 36. "Appendix A" and "Appendix B" refer to appendices *to this brief.*

On October 24, 1967, Local Board Memorandum No. 85 was issued by the Selective Service System (Appendix B, *infra*) and on October 26, 1967 General Lewis B. Hershey, Director of the Selective Service System issued a special letter (Appendix B, *infra*) which encouraged the reclassification of registrants who surrendered their Selective Service documents or who engaged in a variety of other actions thought by General Hershey to be disruptive of the Selective Service System or not in the national interest.

***5** On November 22, 1967, the Minnesota State Director's office notified Local Board No. 115 that petitioner's conscientious objector appeal was denied. On November 27, 1967, petitioner was sent a Notice of Classification advising him of the Appeal Board decision and notifying him again that he was I-A.

On December 21, 1967, petitioner was declared delinquent by the local board. Appendix, p. 44.

Five days later, on December 26, 1967, petitioner was sent an order to report for induction (SSS Form 252) on January 24, 1968.

On January 24, 1968, petitioner appeared at Local Board No. 115 pursuant to the order to report for induction [T. 15] where "he joined the rest of the group. and got on the bus and left for the Federal Building in Minneapolis" (Appendix, p. 10).

At the induction center in Minneapolis, petitioner "indicated to the military personnel there that "he had no intentions to process in any way, such as physical examination or mental" (*Id.* at 12). He was then informed "of the regulations pertaining to refusal to process for induction" (*Id.* at 13) and informed of the penalties for "refusing to be inducted into the service ..." (*Id.* at 13, 21). Petitioner was not given the opportunity to take the one step forward, is prescribed by Army Regulation 601-270(37)(1) nor was the statement of imminent induction, also required by Army Regulation 601-270(37)(1), ever read to him (*Id.* at 19, 22-23). Petitioner signed a statement that said "I refuse to take part in any or all of the prescribed processing" (*Id.* at 15).

***6** In March 1968, petitioner was indicted in the following terms:

"That on or about the 24th day of January, 1968, at the City of Minneapolis, County of Hennepin, in the State and District of Minnesota, DAVID EARL GUTKNECHT willfully and knowingly did fail and neglect to perform a duty required of him under and in the execution of the Universal Military Training and Service Act and the rules, regulations and directions duly made pursuant thereto in that he did fail and neglect to comply with an order of his local board to report for and submit to induction into the armed forces of the United States, in violation of Title 50 App., United States Code, Section 462." *Id.* at 2.

He was tried without a jury, found guilty, and sentenced to four years' imprisonment. The conviction was affirmed by the court of appeals on January 20, 1969. The court held that petitioner's surrender of his draft cards was not protected by the First Amendment, following *O'Brien v. United States,* 391 U.S. 367 (1968), that his accelerated induction as a delinquent was not "lawless or irregular," and that the facts alleged in the indictment had been proved.

Summary of Argument.

The argument below is divided into three major subdivisions, corresponding to the points upon which certiorari was granted.

The Invalidity of the Delinquency Regulations.

In a multi-faceted attack upon the delinquency power which the Selective Service System has arrogated to itself,***7** the argument below contends that the delinquency regulations are invalid on their face and as applied to petitioner in this case.

First, petitioner contends that there is no statutory authorization for the local boards entirely discretionary power to strip registrants of their deferments or exemptions and order them for induction out of the normal order of call established by § 5(a) of the Military Selective Service Act of 1967 and 32 C.F.R. § 1631.7 (a). Noting that no other administrative agency claims the power to impose sanctions or penalties without an express statutory warrant, it is argued that the System frustrates the carefully-designed system of deferments, exemptions and priorities for induction established under Congressional supervision. This argument gains force from an historical summary of the delinquency regulations, which have developed since 1940 from a simple, standardized method of reporting suspected law violators to the United States Attorney for possible prosecution to a system of sanctions superimposed upon and independent of the criminal process.

Next, petitioner contends that even if the Congress can be said to have authorized or ratified the delinquency regulations, the delegation is so broad, vague and standardless as to be invalid. None of the factors which this Court relied upon in the World War II delegation cases (custom and usage; requirements that the administrator give reasons for his acts) are present in the delinquency regulations.

Petitioner also argues that the delinquency regulations are vague and overboard so as to provide no ascertainable standard of conduct for registrants and no criterion for decision by local boards, which are left ***8** free to declare a registrant delinquent or not, and to remove him from that status or not, in their absolute and unguided discretion. This argument rests upon cases invalidating systems of regulation impinging upon speech (which it is claimed is the purpose and effect of the delinquency regulations as applied), and upon the line of nonspeech cases insisting upon precision in statutes or regulations which make up a system of penalties or sanctions.

Petitioner also claims the delinquency regulations to be invalid as violative of procedural due process. If the regulations authorize imposition of punishment, they are invalid for failure to provide the safeguards which the fifth and sixth amendments require accompany a criminal trial. If the Court should view the regulations as not imposing punishment, but merely as authorizing denial or deprival of a statutory or regulatory governmental benefit, they are nonetheless invalid for failure to provide for notice, hearing, confrontation, cross-examination, counsel and the other procedural protections which this Court has insisted upon even in purely “administrative” proceedings.

Petitioner also claims that the application of the regulations to him violated the first amendment. Noting that the Director of Selective Service has issued a memorandum and letter directing local boards to use the delinquency regulations in ways which clearly trespass upon the freedoms of speech and assembly, petitioner argues that the failure of his local board affirmatively ***9** disavow this directive in reclassifying him invalidates its action. The Court simply cannot tell whether the board relied upon a permissible or impermissible standard in reclassifying petitioner. However, even if the Court should conclude that the sole ground for the reclassification was petitioner's failure to possess his registration certificate and notice of classification, it is argued that this conduct was protected by the first amendment.

Petitioner also contends that the delinquency regulations cannot validly be applied to deprive him of his statutory right to be called for induction only when all those under 26, but older than he, have been called. Finally, he argues that the regulations were improperly applied to him because even if failure to possess one's registration certificate or notice of classification is a crime under § 12(b)(6) of the Military Selective Service Act of 1967, it is not a failure to perform a “duty” under the delinquency regulations.

Variance Between Indictment and Proof.

Petitioner was indicted for failure to report for and submit to induction. The government conceded at trial that he did report for induction, but rested its case upon his alleged expression of unwillingness to complete preinduction processing. Petitioner argues that a conviction for refusal to submit to induction can only be had upon proof that a registrant was offered the opportunity to submit to induction in the manner prescribed in the relevant Army regulations. It is uncontested***10** that petitioner was never given this opportunity. If the evidence discloses the commission of any offense, it is an offense for which petitioner was not indicted: failure to obey the orders of the induction station personnel.

The Indictment Fails to State an Offense.

Petitioner argues that an indictment for failure to report for and submit to induction, in a single count, is duplicitous. Failure to report and failure to submit are entirely separate offenses having quite different elements and involving vastly different legal and factual demonstrations by government and defense. Therefore, an indictment which charges both in a single count not only charges two offenses, but fails to apprise the defendant of the nature and cause of the accusation against him.

***11** ARGUMENT.

I. THE DELINQUENCY REGULATIONS, 32 C.F.R. §§ 1642.1 ET SEQ., ARE NOT AUTHORIZED BY THE MILITARY SELECTIVE SERVICE ACT OF 1967; EVEN IF AUTHORIZED BY THE ACT, THE DELEGATION IS VOID AS STANDARDLESS AND UNDULY VAGUE; ALTERNATIVELY, THE REGULATIONS ARE INVALID AS LACKING ANY STANDARD TO GUIDE THE LOCAL BOARDS' JUDGMENT, AS VIOLATIVE OF PROCEDURAL DUE PROCESS OF LAW, AND AS PERMITTING PUNISHMENT OF REGISTRANTS, AS IN THIS CASE, FOR EXERCISING FIRST AMENDMENT RIGHTS. MOREOVER, THE USE OF THE DELINQUENCY POWER UNDER THE CIRCUMSTANCES PRESENT IN THIS CASE IS NOT AU-

THORIZED BY THE REGULATIONS.

The argument below begins with a summary of the present delinquency regulations (32 C.F.R. §§ 1642.1-.46 (1969)), and an analysis of the development of the regulations from their initial, narrow function of record-keeping as to delinquents, through their World War II use as a relatively precise and certain guide to the invocation of the power to deprive a registrant of a deferment or exemption or of a preferred place in the order of call for induction, to their present wholly standardless provisions reposing absolute discretion in the local board as to declaration and remission of delinquency status. The argument which follows this introductory discussion treats the points upon which certiorari was granted in the order set forth in the headnote to this section of petitioner's brief.

***12** A. The Delinquency Regulations Today and Their History.

1. Today's Delinquency Provisions.

The delinquency regulations provide for two "types" of delinquency, which may be designated "declared" and "undeclared." "Undeclared" delinquency is not relevant to this case: a registrant who fails to report for or submit to induction, or who fails to report for civilian alternative service,[FN1] is termed a "delinquent" by the regulations, and is automatically reported by the local board to the United States Attorney, the board's only discretion being to hold up the report for thirty days in an attempt to locate the delinquent and secure his compliance with the order to report for induction or the order to report for civilian work. The regulations imposing this duty upon the local boards constitute a standardized, carefully drawn system for reporting those who have presumptively violated the law by disobeying orders of their local boards and for invoking the system of criminal justice with all of its protections for the rights of an accused.

> FN1. After being classified I-O (conscientious objector opposed to war in any form and to participation in the military, even in noncombatant service).

Usually, however, when the "delinquency" power is spoken of without qualification, "declared delinquency" is what the speaker has in mind. 32 C.F.R. § 1642.4(a) (1969) provides:
"(a) Whenever a registrant has failed to perform any duty or duties required of him under the selective service law other than the duty to comply with an Order to Report for Induction (SSS Form No. 252) or the duty to comply with an Order to Report for Civilian Work and Statement of Employer (SSS Form No. 153), the local board may declare him to be a delinquent."

***13** It will be noted that the board "may", but need not, declare the registrant a delinquent. The balance of § 1642.4 sets out the procedure by which the declaration of delinquency and removal from this status is accomplished:
"(b) When the local board declares a registrant to be a delinquent, it shall enter a record of such action and the date thereof on the registrant's Classification Questionnaire (SSS Form No. 100) and shall complete a Delinquency Notice (SSS Form No. 304), in duplicate, setting forth the duty or duties which the registrant has failed to perform. The local board shall mail the original to the registrant at his last known address and file the copy in his Cover Sheet (SSS Form No. 101).[FN2]

FN2. The “Cover Sheet” is the registrant's permanent selective service file. See Sel. Serv. L. Rep., Practice Manual ¶¶ 1072-76.

(c) A registrant who has been declared to be a delinquent may be removed from that status by the local board at any time. When the local board removes a registrant from delinquency status, it shall enter a record of such action and the date thereof on the registrant's Classification Questionnaire (SSS Form No. 100) and shall advise the registrant of such removal by letter a copy of which shall be filed in his Cover Sheet (SSS Form No. 101).”

Again, note that removal from delinquency status, while it may be done at “any time,” is entirely within the discretion of the local board under the regulations.

The declaration of delinquency carries the following consequences: If a registrant has a deferment or exemption under the Military Selective Service Act of ***14** and the Selective Service regulations (32 C.F.R. Parts 1600 through 1690), he “may” be reclassified IA, I-A-O or I-O,[FN3] as may be appropriate given the information in his file 32 C.F.R. § 1642.12 (1969). The use of the word “may” indicates that the board need not strip a registrant of his deferment or exemption, but has discretion limited only by judicial decision, *e.g.,* *Oestereich v. Selective Service Board,* 393 U.S. 233 (1968), and the National Headquarters of the Selective Service System.[FN4]

FN3. Registrants in these three classifications are referred to as “available for service.” A I-A registrant is avilable for induction as a combatant, a I-A-O registrant is available for induction for noncombatant service (any service not involving the handling of weapons), and a I-O registrant may be ordered to perform civilian work in lieu of induction. See Military Selective Service Act of 1967, § 6(j), 50 U.S.C. App. § 456(j).

FN4. See Supplemental Brief in Support of Petitions for Certiorari, *Breen v. Selective Service Local Board No. 12, Kolden v. Selective Service Local Board No. 4, and Gultkecht v. United States,* Nos. 1114, 1175 and 1176, O.T. 1968, pp. 5-8.

A registrant whose deferment or exemption is taken away under the delinquency power has the same right of personal appearance and appeal that is given to every other reclassified registrant, with no different or additional procedural rights. He may, upon timely request, appear before his local board.[FN5] If he cannot or does not make a personal appearance,[FN6] or if he appears and the board retains him in a class available for service (I-A, I-A-O, or I-O), he may, again upon timely ***15** request, appeal to the appeal board for the federal judicial district in which his local board is located.[FN7] During the pendency of his personal appearance and appeal, he may not be ordered to report for induction or for civilian work. 32 C.F.R. §§ 1624.3, 1626.41 (1969).

FN5. See 32 C.F.R. Part 1624, defining the rights of a registrant upon his personal appearance. See also Sel. Serv. L. Rep., *Practice Manual* ¶¶ 1079-85.

FN6. The regulations do not provide for transfer of the personal appearance. Thus, if a registrant has moved far away from the local board at which he initially registered, he may well be unable to meet the expense of a journey to the board for the purpose of discussing his case.

FN7. Failure to request a personal appearance does not waive the registrant's right to take an appeal to the appeal board. He may appeal in writing (by letter to his local board) within thirty days after the board mails him its initial notice that it has reclassified him, or (if he exercises his right to a personal appearance) within thirty days after the board sends him the notice of classification reflecting its decision after the personal appearance. If he resides in a federal judicial district other than that in which his local board is located, he may transfer the appeal to the appeal board having jurisdiction over his place of residence. If he is employed in a federal judicial district other than that in which his local board is located, and his case involves a claim to an occupational deferment (Class II-A), he may appeal to the appeal board for the federal judicial district in which he is employed. The regulations governing appeals are set out in 32 C.F.R. Part 1626. See also Sel. Serv. L. Rep., Practice Manual ¶¶ 1085-94.

A registrant who is declared delinquent and who, like petitioner Gutknecht, is not deferred or exempt has no appeal rights whatever. He is not entitled to an appearance before his local board, nor to an appeal to the appeal board. He is simply I-A (or I-A-O or I-O) delinquent unless and until the local board removes him from that status.

When a delinquent registrant classified in or reclassified to Class I-A (or I-A-O or I-O) has exhausted whatever appeal rights he may have, his local board "shall" order him to report for induction (or for civilian work if he is I-O), ahead even of volunteers for induction. 32 C.F.R. § 1642.13. This "priority induction" provision deprives a registrant of benefits to which he is entitled under 32 C.F.R. § 1631.7 (1969), which sets out the order in which registrants who ***16** I-A or I-A-O are to be called for induction, and 32 C.F.R. Part 1660, which provides that a I-O registrant may not be called for civilian work any sooner than he would have been ordered to report for induction if he were I-A or I-A-O. § 1631.7 provides for two methods of computing the "order of call" for induction, only one of which has ever been used and is in issue here.[FN8]

FN8. The other "order of call" provision, § 1631.7(b), was enacted after the Military Selective Service Act of 1967 gave the President authority to institute calls for induction by "age groups" rather than under the § 1631.7(a) "oldest first" system. This power has never been used by the President.

Briefly, § 1631.17(a) provides for six categories of inductees. The board must select men for induction from among those registrants who are I-A or I-A-O, physically examined and found qualified, by category and within each category in the manner set out in the regulations.[FN8a] The number of men selected by each ***17** from among its own registrants is determined by the monthly "call" for induction. After the Secretary of Defense determines how many men must be conscripted in a given month, this figure is given to the Director of Selective Service. The Director establishes a "call" for induction which is somewhat larger than the number of inductees needed, due to the probability that some potential inductees will be disqualified during final processing or will refuse to submit to induction. The Director divides this call among the states. Each State Director of Selective Service apportions his state call among the local boards in his state, with each local board receiving a call in proportion to the number of its registrants who are in a class available for service and who have been examined and found qualified.[FN9] 32 C.F.R. § 1631.1 (1969).

FN8a. The six categories, as set out in § 1631.7(a), are:

"(1) Delinquents who have attained the age of 19 years in the order of their dates of birth with the oldest being selected first.

"(2) Volunteers who have not attained the age of 26 years in the sequence in which they have volunteered for induction.

"(3) Nonvolunteers who have attained the age of 19 years and have not attained the age of 26 years and who (A) do not have a wife with whom they maintain a bona fide family relationship in their homes, in the order of their dates of birth with the oldest being selected first, or (B) have a wife whom they married after the effective date of this amended subparagraph and with whom they maintain a bona fide family relationship in their homes, in the order of their dates of birth with the oldest selected first.

"(4) Nonvolunteers who have attained the age of 19 years and have not attained the age of 26 years and who have a wife whom they married on or before the effective date of this amended subparagraph and with whom they maintain a bona fide family relationship in their homes, in the order of their dates of birth with the oldest being selected first.

"(5) Nonvolunteers who have attained the age of 26 years in the order of their dates of birth with the youngest being selected first.

"(6) Nonvolunteers who have attained the age of 18 years and 6 months and who have not attained the age of 19 years in the order of their dates of birth with the oldest being selected first.

In selecting registrants in the order of their dates of birth, if two or more registrants have the same date of birth they shall, as among themselves, be selected in alphabetical order."

FN9. There is a great disporportion among local boards as to the number of persons registered. Nat'l Advisory Comm'n on Selective Service, in Pursuit of Equity: Who Serves When Not All Serve? (1967).

This, briefly, is the present system. Its predecessors are worthy of attention for the light they shed upon its scope and meaning.

2. Precursors of Delinquency: The 1917 Act.

Under the Selective Draft Act of 1917, 40 Stat. 76 (1917), a registrant was in the military from the date ***18** in his notice from the local board. Section 2 provided:
"All persons drafted into the service of the United States ... shall, from the date of said draft ..., be subject to the laws and regulations governing the Regular Army."

Every male between the ages of 21 and 30 was required to fill out a registration form. If a subject male failed to do so, his name was forwarded to the Army, which sent him a notice "drafting" him. See *United States ex rel. Bergdoll*

v. Drum, 107 F. 2d 897 (2d Cir. 1939). He would also be subject to prosecution for a misdemeanor for failure to register. Selective Draft Law § 5, 40 Stat. 80.

One who was ordered to report and did not do so was rounded up by the Army and courtmartialed as a deserter. See *United States ex rel. Bergdoll v. Drum, supra; Billings v. Truesdell,* 321 U.S. 542, 54546 (1944). Other infractions against regulations under the Selective Draft Law were dealt with in similarly summary fashion.[FN10] Roundups of "slackers" occurred regularly, and there is little formal record of the disposition of most cases arising in such mass arrests; one may legitimately suspect that the arrested persons either produced some evidence of registration or deferment, or found themselves in the military,[FN11] much as would ***19** to any person who had been required to register but had not done so. In summary, it may fairly be said that enforcement of the Selective Draft Law with respect to those subject to service was left principally to the military, with local boards and civilian prosecutorial officials playing a reporting and policing role. Only with regard to conspiracies to obstruct the draftspeechmaking about the war, pamphleteering, and other activities by those not subject to conscription, and violations of "police regulations" such as those regarding liquor and prostitution near military reservations, see note 10 *supra,* was civilian authority routinely invoked and criminal proecutions commenced in the federal district courts. See *Schneck v. United States,* 249 U.S. 47 (1919); *Ruthenberg v. United States,* 245 U.S. 480 (1918).

FN10. Not under discussion here are the penal provisions of the 1917 Act which permitted the Secretary of War to regulate the dispensing of liquor and prevent the keeping of bawdy houses near military reservations. §§ 12, 13, 40 Stat. 82-83. These regulations, upheld in *McKinley v. United States,* 249 U.S. 397 (1919), know no parallel in the present Military Selective Service Act of 1967.

FN11. The pressure to turn the prosecution of antiwar activities, including speech, over to military authorities was great. See 1 Emerson & Haber, Political and Civil Rights in the United States 284-90 (2d ed. 1958). *Cf.* Dranitzke, *Possession of Registration Certificates and Notices of Classification by Selective Service Registrants,* 1 Sel. Serv. L. Rep. 4029 (1968).

3. The World War II Experience.

The Selective Training and Service Act of 1940, 54 Stat. 885 (1940), 50 U.S.C. App. § 301 (repealed), marked a significant departure from the 1917 Act, as far as enforcement was concerned. This change, chronicled and interpreted in *Billings v. Truesdell,* 321 U.S. 542 (1944), consisted principally in committing to the civil courts the responsibility for enforcing compliance with the conscription law and for punishing refusals to report for or submit to induction. Section 11 of the 1940 Act (almost identical to § 12(a) of the Military Selective Service Act of 1967, 50 U.S.C. App. § 462(a)) "withheld from military courts martial jurisdiction of cases arising under the Act unless the person involved***20** had been 'actually inducted' or 'unless he is subject to trial by court martial under laws in force prior to the enactment of this Act.' " *Billings v. Truesdell,* 321 U.S. at 546. Section 3 of the 1940 Act provided, as does section 4(a) of the Military Selective Act of 1967, 50 U.S.C. App. § 454(a), that no person should be inducted until his physical and mental fitness had been determined under applicable standards.

Nowhere in the 1940 Act was any mention made of "delinquency" or "delinquents". The regulations issued under the Act, codified to 32 C.F.R., chapter VI (1940 Supp.), introduced the term "delinquent" to the Selective Service

law.[FN12] 32 C.F.R. § 601.106 (1940 Supp.) defined a delinquent as:

> FN12. The regulations were issued at different times. The deliquency provisions with which we are here concerned were part of Exec. Order 8545, Sept. 23, 1940, 5 F.R. 3779, and Exec. Order 8560, Oct. 4, 1940, 5 F.R. 3923. In this brief, citations to appropriate C.F.R. codifications will be used rather than the Federal Register citations.

"(a) any man, required under the selective service law and directions given pursuant thereto to present himself for registration on a certain day fixed by the President, who fails to so present himself and submit to registration on that day and has no valid reason for having failed to perform that duty; or (b) any registrant who prior to his induction into the military service fails to perform at the required time, or within the allowed period of given time, any duty imposed upon him by the selective service law, and directions given pursuant thereto, and has no valid reason for having failed to perform that duty."

32 C.F.R. §§ 603.389 through 603.392 prescribed the procedure to be followed by the local board when it had "reason to believe" that a nonregistrant under its jurisdiction***21** or one its registrants was a delinquent. These regulations provided that the local board should prepare a notice of delinquency and mail one copy to the suspected delinquent, mail one copy to the Governor and file one copy. 32 C.F.R. §603.389 (1940 Supp.). The notice required the delinquent to report to the local board. 32 C.F.R. § 603.390 (1940 Supp.). The board was to investigate the suspected delinquency to determine if the delinquent was, in its view, "innocent of any wrongful intent." If it found him innocent, the board proceeded to process him just as any other registrant. *Id.* If it found his intent other than innocent, or if the suspected delinquent failed to report to the local board within five days after the notice of delinquency was mailed, the board turned the case over to the United States Attorney. § 603.391. Thus, the board's determination of "intent" was an administrative decision whether or not to invoke the criminal process, with all its safeguards of indictment by a grand jury, apprisal, counsel, confrontation, jury trial, compulsory process, and privilege against self-incrimination. This determination is cognate to that provided in 47 U.S.C. '§ 503-04: These sections authorize a civil suit for forfeitures of up to $10,000 for violations of a licensee's responsibilities under the Communications Act. As a condition precedent to such a suit, the FCC must make a determination of "apparent liability," which Professor Jaffe terms "a semi-formal though legally inconclusive adjudication." Jaffe, Judicial Control of Administrative Action 113 (1965). The same description would aptly apply to the delinquency regulations as originally issued.

On December 30, 1941, after Pearl Harbor, the selective service regulations were amended, effective February***22** 1, 1942. The delinquency provisions, though recodified to 32 C.F.R. Part 642, remained essentially unchanged. The local board was directed to make up notices of delinquency in quadruplicate instead of triplicate, and post the additional copy. 32 C.F.R. § 642.1 (a) (1938-43 Supp.). The cooperation of press, radio and police was to be sought in locating suspected deliquents. 32 C.F.R. §§642.1(b), 642.2(d) (1938-43 Supp.). If the board determined that a registrant was not innocent of wrongful intent or if it was unable to locate him, it was, as under the former regulations, to report him to the United States attorney. However, 32 C.F.R. § 642.5 (1938-43 Supp.) provided that after referral of a case to the United States Attorney, if a delinquent offered to bring himself into compliance with the law, the board was to inform the United States Attorney of the offer and, if the United States Attorney requested, to "offer a suggestion as to the advisability of discontinuing the prosecution of a delinquent who has complied or is complying with the law." 32 C.F.R. § 642.5 (193843 Supp.). The board was given a guideline for use in making its judgments:

"If it is determined that the delinquency is not wilful, or that substantial justice will result, the local board should encourage the delinquent to comply with his obligations under the law and, if he does so or offers to do so, should urge that any charge of delinquency against him or any prosecution of him for delinquency be dropped." *Id.*[FN13]

FN13. Of course the statute did not permit a prosecution for "delinquency," but only for violation of its express terms or of duties imposed by valid regulations or directions of the local board. The question whether a given regulation imposes a "duty" the violation of which may be the subject of criminal punishment is taken up in Part I, F, *infra.*

***23** Again, the regulations provided a means by which the board and the United States Attorney would work together in finding suspected delinquents and either obtaining compliance with the law or initiating a criminal prosecution; the board was not given the task of punishing or disciplining law violators, but only of advising the United States Attorney in the exercise of his prosecutorial discretion.

In 1943, however, the regulations were radically altered. The definition of delinquent was changed somenwhat,[FN14] and Part 642 of 32 C.F.R. was completely rewritten. A delinquent nonregistrant was to be brought before the board, registered and classified in a class available for service.[FN15] 32 C.F.R. §§ 642.11-.2 (1943 Supp.). In addition, the regulations required that the board reclassify in a class available for service any registrant who failed to perform a duty required under the Act and regulations and induct him as soon as possible without regard to the order of call established elsewhere in the regulations. 32 C.F.R. § 642.13(a).[FN16]

FN14. 32 C.F.R. § 601.5 (1943 Supp.), as amended by 8 F.R. 14115: "a delinquent is any man liable for training and service ... who fails or neglects to perform any duty required of him under the provisions of the Selective Training and Service Act of 1940, ... or rules and regulations made pursuant thereto."

FN15. The classes available for service were I-A, I-A-O and IV-E. IV-E corresponds to the present day I-O classification. See 32 C.F.R. § 622.51 (1938-43 Supp.).

FN16. Delinquents over 45 were merely to be reclassified as over the age of liability. 32 C.F.R. § 642.12(b).

The board was directed to accord a registrant whose deferment or exemption had been taken away the procedural rights of personal appearance and appeal to which he would otherwise have been entitled. 32 C.F.R. § 642.14(a) (1943 Supp.). The regulations also provided***24** that in the case of a registrant who was not reclassified as a result of his delinquency and who therefore was not entitled to a personal appearance and appeal, the local board could "reopen" the classification and accord the rights of personal appearance and appeal "at any time before induction." 32 C.F.R. § 642.16(b) (1943 Supp.). However, the regulation provided "That the local board, regardless of other circumstances, shall decline to reopen the classification of such registrant if it determines that he knowingly became a delinquent." *Id.*

In the case of a registrant who had an appeal of right under § 642.14(a), or who was given appeal rights under § 642.14(b), the appeal board was directed to examine the file and determine whether or not "the registrant knowingly

became a delinquent." If so, he was to be retained in a class available for service; if not, he was to be "classified on appeal in the usual manner" and the fact that he was a delinquent was to be "disregarded." 32 C.F.R. § 642.14(c) (1943 Supp.). Other provisions of the regulations provided for cooperation between the local board and the Justice Department or local United States Attorney, and for the keeping of necessary records. 32 C.F.R. §§ 642.41-.46 (1943 Supp.).

In sum, the 1943 amendment gave the board the power to send a man into the military for a violation of the law or regulations. This Court may take notice of the difficult and dangerous times which no doubt led to the Selective Service System legislating itself such power. At least, however, the 1943 regulations provided an ascertainable standard for the board's action--the registrant who "knowingly" became delinquent was treated differently from he who became delinquent ***25** oversight or neglect or good faith ignorance of the law's requirements, although the fact-finding mechanism by which such determinations were made left something to be desired.

The delinquency regulations were not again amended during the effective period of the 1940 Act, except for minor changes in 1944 and 1946. 32 C.F.R. § 642.12 (1944 Supp.); 32 C.F.R. §§ 642.12-.13 (1946 Supp.).[FN17]

> FN17. The 1946 change apparently required the local board to withhold induction or order to civilian work of a delinquent upon written request of the United States Attorney. Earlier regulations had only required that the United States Attorney be kept informed of the declarations of delinquency by the board and that his advice be asked. 32 C.F.R. § 642.42 (1943 Supp.).

4. Delinquency Regulations Since 1948.

In 1947-48, the Office of Selective Service Records maintained draft records under the Act of Mar. 31, 1947, 61 Stat. 31, codified to 50 U.S.C. App. §§ 321-29 (repealed). The Selective Service Act of 1948, 62 Stat. 204, reinstituted conscription in substantially its present form. The regulations issued under the 1948 Act, 32 C.F.R. Part 1642, are almost identical to the present delinquency regulations.

The 1948 Act, like its predecessors, did not contain any reference to delinquency or delinquents. Not until 1967, in § 6(h)(1) of the Act, did Congress mention "delinquents."

Thus, the history of the delinquency provisions shows an evolution by administrative regulatory fiat away from a simple reporting system, through a standardized coercive mechanism giving a local board quite limited discretion, to today's utterly standardless system subject only to occasional administrative or judicial correction. Petitioner turns to an analysis of this system of rules.

***26** B.The Delinquency Regulations, 32 C.F.R. Part 1642, Are Not Authorized by the Military Selective Service Act of 1967 and Are, Therefore, Void.

The delinquency power is extraordinary. No federal agency claims to have comparable authority to that which Part 1642 commits to local boards--the power to order a man to two years of military service for an infraction of regula-

tions without providing procedural safeguards. The Selective Service System is not bashful in characterizing the delinquency power:

"Selective Service Regulations are designed to delay the prosecution of a violator of the law until after he has failed to report for or refused to submit to induction or assigned civilian work. This is to prevent, wherever possible, prosecutions for minor infractions of rules during his selective service processing, thereby reducing the number of cases that reach the courts and also giving the registrant, before being prosecuted, an opportunity to report for service in the armed forces. Since the purpose of the law is to provide men for the military establishment rather than for the penitentiaries, it would seem that when a registrant is willing to be inducted, he should not be prosecuted for minor offenses committed during his processing. The result of this procedure is that the great majority of prosecutions involve the failure to report for or refusal to submit to induction or assigned civilian work."

"The escalation of the United States military involvement in Vietnam increased the draft calls, and ***27** there was an upsurge of public demonstrations in protest. Some of these protests took the form of turning 'draft' cards in to various public officials of the Department of Justice, the State or National Headquarters of Selective Service System, or directly to local boards. By agreement with the Department of Justice, registrants who turned in cards (as contrasted to those who burned cards) were not prosecuted under section 12(a) of the Military Selective Service Law of 1967, but were processed administratively by the local boards. In many instances, the local boards determined that a deferment of such registrant was no longer in the national interest, and he was reclassified I-A delinquent for failure to perform a duty required of him under the Act, namely retaining in his possession the Registration Card and current Notice of Classification card."

Hershey, *Legal Aspects of Selective Service* 46-47 (1969).

This claimed power--to ease the burden on the criminal courts by stripping rule-violators of their deferment or exemptions and then giving them the Hobson's choice (termed an "opportunity") between reporting for induction and being prosecuted for not doing so--is exercised under the regulations entirely at the discretion of the local board, without statutory or regulatory standards to define the kinds of conduct which make delinquency declaration appropriate, or to guide the board in determining which registrants who are in technical default should be declared delinquent and when if ever should be removed from that status.

***28** This Court noted in *Oestereich v. Selective Service Board,* 393 U.S. at 236-237, that "Congress did not define delinquency; not did it provide any standards for its definition by the Selective Service System." Moreover, the Court, holding that Congress has not authorized revocation of statutory exemptions under the delinquency power, left open the question whether the delinquency power was authorized at all by the statute under which the Selective Service System is to operate. Petitioners contend that it is not.

We begin with the proposition that a deferment or exemption is a valuable right granted by statute or administrative regulation. Similarly, the order of call preference under 32 C.F.R. § 1631.7(a) which was taken from petitioner Gutknecht by the declaration of delinquency is a valuable right extended by the Congress, which in the 1967 renewal of the conscription law mandated the President to retain the "oldest first" order of call then in effect, and prohibited institution of a random selection system. Military Selective Service Act of 1967, § 5(a) (2), 50 U.S.C. App. § 455(a)(2). The rights of which the petitioners in this case and *Breen,* No. 65, were deprived by the declaration of delinquency cannot be distinguished away by terming them merely the products of legislative or administrative

grace. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law,* 81 Harv. L. Rev. 1439 (1968); Tigar & Zweben, *The Selective Service System: Some Certain Problemts and Some Tentative Answers,* 37 Geo. Wash. L. Rev. 510, 527-28 (1969). Even if the "rights" of which petitioners Gutknecht and Breen were deprived cannot be said to be "statutory" rights, they are clearly benefits granted by ***29** administrative regulation under standards prescribed by Congress with some precision in areas of paramount Congressional concern. Even though Congress has expressed in the legislative history and the act itself its desire to prevent the President from tinkering with the order of call,[FN18] the delinquency regulations provide that the board shall ignore the order of call in every case. And a fair reading even of sections of the Act authorizing the President to make rules concerning deferments fails to show a Congressional design that such power should be used to provide for revocation of deferments on grounds unrelated to their grant or denial or not generally applicable to an entire class of deferred persons. It is simply not rational to believe that Congress authorized stripping registrants of rights for which it so carefully provided without some positive sign of Congressional intention. *Cf. Kent v. Dulles,* 357 U.S. 116 (1958).[FN18a]

FN18. See H.R. Rep. No. 346, 90th Cong., 1st Sess. at 9-10 (1967) (language of § 5(a)(2) intended to prevent institution of random selection system).

FN18a. Indeed, § 6(k) of the Act, 50 U.S.C. App. § 456(k) provides that "No ... exemption or deferment from training and service, under this title, shall continue after the cause therefore ceases to exist." This is but another way of saying that a deferment or exemption *should* continue *until* the cause therefor ceases to exist.

Nor must one forget that the Selective Service System's own characterization of delinquency as designed to "prevent prosecutions ... for minor infractions of rules", quoted *supra,* acknowledges what is clear from the face of the regulations and from the facts of their administration: The delinquency regulations punish or penalize a registrant for rule violations.

***30** The question, therefore, is whether the Congress has authorized a civil administrative system of penalties for rule violations, to be invoked at the discretion of local boards. One indication that such a system has not been authorized is that petitioner has been unable to find a single other instance of an administrative agency claiming to possess such power without an express statutory authorization for it. The civil fraud penalties construed in *Helvering v. Mitchell,* 303 U.S. 391 (1938) were established by statute. The divestiture of citizenship provisions held unconstitutional in *Kennedy v. Mendoza-Martinez,* 372 U.S. 144 (1963), had their provenance in the Immigration and Nationality Act. See generally Jaffe, Judicial Control of Administrative Action 109-19 (1965).

Moreover, given the absence of procedural protections--counsel, confrontation, cross-examination--in the delinquency regulations, and the severity of the sanction they impose, the Court should not uphold them absent the most careful and explicit grant of authority in the enabling legislation. *Cf. Greene v. McElroy,* 360 U.S. 474 (1959); *Schneider v. Smith,* 390 U.S. 17 (1968). This Court remarked in *Oestercich* upon the absence of such a grant of authority, 393 U.S. at 236-237, and the Solicitor General in his brief in that case went even further:
"It is difficult to believe that Congress intended the local boards to have the unfettered discretion to decide that any violation of the Act or regulations warrants a declaration of delinquency, reclassification and induction...." Brief for the United States, p. 54.

***31** The Solicitor General also remarked not unfavorably upon the opinion of Judge Dooling in *United States v. Eisdorfer,* 1 Sel. Serv. L. Rep. 3115 (E.D. N.Y. 1968), that "The delinquency regulations, moreover, disregard the structure of the Act; deferments and priorities-or-induction, adopted in the public interest, are treated as if they were forfeitable personal privileges." *Id.* at 3116.

Petitioner recognizes that a 1967 amendment to the Act speaks of "delinquents". Military Selective Service Act of 1967, § 6(h)(1), 50 U.S.C. App. § 456(h)(1). But this reference has to do only with order of call, and with order of call only in the event that the President institutes a call by "age groups," under 32 C.F.R. § 1631.7(b), which he has never done. Moreover, the reference to "delinquents" could as easily have been intended to refer to "undeclared delinquents," see I, A, 1 *supra,* and be simply an acknowledgment that a registrant who has refused to report for or submit to induction should remain at the top of the list for induction, ahead of those who may, though older than he is, become eligible for selection subsequent to the issuance of an order to him. This Court's opinion in *Leary v. United States,* 37 U.S.L.W. 4397-4400-02, 394 U.S. ..... (1969), cautions against conjuring with the notion of an all-knowing Congress, perennially and automatically approving every administrator's most extravagant claim to unconfined and vagrant power merely by renewing his general grant of authority over a particular field. This argument gathers force from the express language of § 5(a) of the Act, 50 U.S.C. App. § 455(a), which permits the President to select and induct only men not "deferred or exempt."

***32** The history of the delinquency regulations, and their gradual shift of emphasis from a reporting function, through a standardized and definite punitive function, to today's entirely discretionary and standardless grant of a roving commission to find and punish alleged violators, bespeaks the administrator's gradual and piecemeal enlargement of his domain, with little regard for Congressional authorization or approval. The situation here is rather like that in *Kent v. Dulles,* 357 U.S. 116 (1958), another case in which an administrator's zeal was found to have carried him beyond his Congressionally-derived powers.

The delinquency regulations must, therefore, be held invalid because the Military Selective Service Act does not authorize the President to make them.

C. If Congress Authorized the Making of Delinquency Regulations, the Delegation Is Void for Want of Standards to Guide the President in Making Rules and Local Boards in Enforcing Them.

Even a casual reading of the delinquency regulations must freshen the meaning of Justice Cardozo's perception concerning "unconfined and vagrant" power, "not canalized within banks to keep it from overflowing." *Schecter v. United States,* 295 U.S. 495, 551 (1935) (concurring opinion). To begin, the single word "delinquents" in § 6(h)(1) of the Military Selective Service Act seems hardly calculated to inform the President's discretion in making regulations or that of the local boards in carrying them out. If the delegation is to be sustained, it must be upon the theory of cases such as *Fahey v. Mallonee,* 332 U.S. 245 (1947), ***33** validating an arguably overboard delegation based upon "history and customs," 332 U.S. at 254, or *Yakus v. United States,* 321 U.S. 414, 426 (1944), upholding the Office of Price Administration legislation in part because "the standards ... with the aid of the 'statement of considerations' required to be made by the Administrator, are sufficiently definite and precise to enable Congress, the courts and the public to ascertain whether the Administrator, in fixing those prices, has conformed to those stand-

ards." But neither the *Fahey* nor *Yakus* rationales apply to the Selective Service System. There is no known "custom and usage" in the administration of the System, for local boards are not required to give any reasons for their decisions. Millions of classification decisions have been made by local boards, but the courts have almost uniformly held that in all but the narrowest of circumstances the board's decision need be expressed only as a classification symbol. See generally, Shattuck, *Record-Keeping Obligations of Local Boards,* 1 Sel. Serv. L. Rep. 4015 (1968). *Cf.* Rosenblum, *Low Visibility Decision Making by Administrative Agencies: The Prlblem of Radio Spectrum Allocation,* Ad. Law Rev., Fall 1965, at 19; Tigar & Zweben, *supra* at 525-31. Moreover, the Act does not require the President, in making regulations, to give reasons or a "statement of considerations." Indeed, it exempts the System entirely froth the rulemaking and adjudicatory provisions of the Administratrative Procedure Act. Military Selective Service Act of 1967, § 13(b), 50 U.S.C. App. § 463(b). See *United States v. Robel,* 389 U.S. 258, 269-82 (1967) (Brennan, J., concurring).

Nor can this delegation somehow be held to survive based upon the President's plenary powers in the conduct***34** of the nation's defense. Whatever might be those powers in time of war, or even of total national mobilization absent a declaration of war (the legality of which would of course be open to some question), it is clear that today the Selective Service System operates as a means of classifying men with an eye both to induction and to deferment, with careful attention to the needs of both the military and civilian economy. The change in the title of the Act in 1967 from the "Universal Military Training and Service Act" to the "Military Selective Service Act of 1967" was intended to betoken a Congressional judgment that the character of service is "selective." See Civilian Advisory Panel on Military Manpower Procurement, Report to Committee on Armed Services, 90th Cong., 1st Sess. at 10 (Comm. Print 1967). In World War II, the need was urgent to raise a large army and raise it quickly: Today, there is no grave and immediate danger to the public safety which would justify the Congress in abdicating so utterly its primary Constitutional power "to raise armies." *Cf. Kent v. Dulles, 357* U.S. 116 (1958). It is open to serious doubt that even in time of war the Congress could hand over to the Executive, absolutely without limit, its Article I responsibilities in the matter of the military establishment. *United States v. Robel, supra.* Indeed, it would be a serious mistake to regard the "war power" as even relevant to decision in this case. First, the war power does not exist as such, but rather as a collection of powers given the Executive for use in the conduct of foreign affairs and as commander-in-chief of those already in the military. Congress, by the emphatic terms of Article I, is given the sole power to raise an army. This power was thought so important to the constitutional system of ***35** checks and balances as to warrant extensive discussion in the Federalist papers. See Federalist Nos. 24-29. The root question in this case, therefore, is whether the Congress has delegated its power, and if so whether the delegation is sufficiently precise to permit the recipient of the power to use it in harmony with the Congressional will and the courts to judge whether the Congressional will is being carried out in particular exercises of the power. The use of the single word "delinquents" seems hardly calculated to inform any administrator's discretion.

Therefore, because the purported Congressional delegation is unduly broad, and because no custom, usage, history, or requirement of justification limits the use of the power granted, it is void, as are the regulations made in purported reliance upon it.

D. Even if the Regulations Are Authorized by Statute, and the Delegation Is Not Unduly Broad, the Delinquency Regulations Are Void for Vagueness and Overbreadth.

The delinquency regulations were recently described as follows by a federal district court judge who held them invalid:

"Although the imposed duties range widely in importance and in the inherent probability that non-compliance will be willful or will be damaging to the just administration of the selective service system, if there is any failure to perform any duty, 'the local board may declare [the registrant] to be delinquent' whether the failure is the result of innocent inadvertence, reasonable misinterpretation, negligence, willful disobedience rooted in principle, ***36** or malign evasion. 32 C.F.R. § 1642(a). There are no degrees of delinquency. No standards prescribe the particular occasions when the power is to be exerted, or what findings of gravity, of willfulness, of penitence, or reparation are relevant to deciding whether or not to declare the registrant delinquent. It does not help that the regulations may not be insupportably vague in describing the duties imposed. The fault is in the mere absence of any standard or guide to the evaluation of the importance of the omitted duty and the guilt-character of the omission to perform it .... [T]he regulations contemplate only one kind of delinquency with one consequence for all cases in which the status is acted upon, and there is no alternative except complete remission again by local board action taken at unbounded discretion." *United States v. Eisdorfer,* 1 Sel. Serv. L. Rep. 3115, 3116 (E.D.N.Y. 1968). And see *United States v. Eisdorfer,* 2 SSLR 3002 (E.D.N.Y. 1969).

The above description of the regulations was placed before the Court for its consideration in *Oestereich, supra,* in the appendix to the Solicitor General's brief, but *Oestereich* did not require the Court to confront the broader issues concerning the validity of the regulations which the district court ultimately found necessary to its decision in *Eisdorfer.* Now the issue is here again, and petitioner contends that even if delinquency regulations are authorized by a valid statutory grant, the present regulations are void for vagueness. The President has visited upon the local draft boards an ostensibly limitless power to keep registrants guessing about the impact of even minor departures from ***37** the regulations. A minor delay in reporting a change of address, occupation or physical condition, equally with more serious breaches of duty, may trigger an irreversible process resulting swiftly in the registrant's involuntary confinement in the military for two years or more.[FN19] The possibilities of discriminatory enforcement inherent in such a scheme must give pause, particularly in the face of the System's record of abusing the delinquency power to meddle with first amendment rights. A dissentient registrant must be temerarious indeed to invite precipitous induction and take his chances on judicial review. But whether or not free speech is held to be at stake, the regulations must fail for want of an intelligible standard to guide the board in its decision. Petitioner discusses these questions in turn.

FN19. We trust that there is no argument as to whether being in the military is confinement, for this Court has traditionally recognized that habeas corpus is available to test unlawful induction, most recently in *Oestereich,* 393 U.S. at 235.

1. The Regulations Give Boards Unwarranted Discretion to Meddle With Free Speech.

The delinquency regulations have been used to threaten and to punish constitutionally protected speech, and the officials of the Selective Service System have approved of this use.[FN20] See *Nat'l Students Ass'n v. Hershey,* .... F. 2d ...., 2 Sel. Serv. L. Rep. 3030 (D.C. Cir. 1969); *Wolff v. Selective Service Local Board No. 15,* 372 F. 2d 817 (2d Cir. 1967); Appendix B, *infra.* It is argued below that they were so used in this case. ***38** *Cf.* also *Oestereich v. Selective Service Board,* 393 U.S. 233 (1968). The breadth and vagueness of the regulations permits this result, and even

though the Court may rule against petitioner on the merits of *his* first amendment claim, the fear that rights will be restricted *sub silentio* by vague and overbroad rules of conduct has often led this Court to depart from the general rule that one may not question the constitutionality of a provision as it may be applied to others, and to consider possible fact situations other than that before it. See, *e.g.,* *NAACP v. Button,* 371 U.S. 415, 432-33 (1963); *Freedman v. Maryland,* 380 U.S. 51 (1965); Comment, 54 Calif. L. Rev. 132, 148 (1966).[FN21] See also *Soglin v. Kaufman,* 286 F. Supp. 851 (W.D. Wisc. 1968).

FN20. *Cf.* *Yick Wo v. Hopkins,* 118 U.S. 356, 373 (1886):
"[T]hey are applied by the public authorities ... with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws...."

FN21. The cited comment contains an excellent analysis of the first amendment doctrines of vagueness and overbreadth.

The board's power under the delinquency regulations is little different from that found objectionable in *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58 (1963), in which this Court struck down an informal censorship scheme which Rhode Island had superimposed upon the criminal process. The sole difference between this case and *Bantam Books* is that since 1943 local boards have not been limited to exhortatory pronouncements to comply with the law. Here, as in *Bantam Books,* the regulatory scheme has a proven record of adverse impact upon speech. *Nat'l Students Ass'n v. Hershey, supra.* Here, as there, the standards are vague. Here, as there, the agency "has done nothing to make [its mandate] more precise." 372 U.S. at 71. And, as is argued extensively *infra,* here as in *Bantam Books* the procedures employed are not "hedged about with the safeguards ***39** of the criminal process." *Id.* Quite simply, in the words of a student author characterizing the vice of Rhode Island's censor board, "Conduct may be circumscribed by an administrative determination which, if acquiesced in, precludes a judicial determination of whether the conduct intended or committed constitutes a protected form of expression." 54 Calif. L. Rev. at 153-154. *Cf.* *Freedman v. Maryland,* 380 U.S. 51 (1965).[FN22] Because of the actual and potential impact of the delinquency regulations upon the protected freedoms of speech and association, they must be held invalid unless, at a minimum, they contain "appropriate standards" to guide the local board's action. *Kunz v. New York,* 340 U.S. 290, 295 (1951). See also *Cox v. Louisiana,* 379 U.S. 536, 557 (1965); *Niemotko v. Maryland,* 340 U.S. 268 (1951); *Saia v. New York,* 334 U.S. 558 (1948); *Cantwell v. Connecticut,* 310 U.S. 296 (1940).

FN22. The unavailability of judicial review prior to induction in all but exceptional situations, compare *Oestereich v. Selective Service Board,* 393 U.S. 233 (1968) with *Clark v. Gabriel,* 393 U.S. 256 (1968), reinforces the potentially intimidating aspect of the delinquency regulations and renders them all the more subject to constitutional infirmity.

Nor will the first amendment permit the System to rely upon judicial and administrative limitations upon the delinquency power to save its regulations from invalidity. *Dombrowski v. Pfister,* 380 U.S. 459 (1965), held that decisional elaboration of standards can have no place in the law of the first amendment:
"If the rule were otherwise, the contours of regulations would have to be hammered out case by case --and tested only by those hardy enough to risk criminal prosecution to determine the proper scope of regulation." *Id.* at 487.

***40** Even had the rule reaffirmed in *Doimbrowski* never been made, the delinquency regulations could not stand. Because selective service regulations are not made in conformity with the Administrative Procedure Act, and because local boards need give no reasons for their decisions, there are no regulations, directives, reports of decisions or other administrative materials which define and limit the delinquency power.[FN23]

FN23. There is an outstanding directive of the Director of Selective Service broadening the delinquency power. See Appendix B, *infra.*

Each of the 4092 local draft boards, untrained in the law and often impatient with the rights of registrants, is free to make up its own mind in every case as to what constitutes delinquency and what does not, with only the narrowest review. See generally Davis & Dolbeare, Little Groups of Neighbors (1968) (a detailed statistical study of local board performance).

Moreover, neither the Justice Department nor the Selective Service System has ever attempted to explain why so sweeping a system of control as is contained in the delinquency regulations is necessary to compel compliance with the Military Selective Service Act and its implementing regulations, particularly given the express judgment of Congress that the *federal courts* shall be relied upon "for enforcement purposes." *Estep v. United States,* 327 U.S. 114, 119 (1946). Even in time of war--in 1943--the regulations were far more precise than in their present version. See I, A *supra.* In short, the government has not shown--and petitioner believes cannot show--that a regulatory scheme posing less danger to protected freedoms would not suffice:

"Since this case involves a personal liberty protected by the Bill of Rights, we believe that the ***41** proper approach must be that adopted by this Court in NAACP v. Button, 371 U.S. 415.... 'The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused, or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application.... The threat of sanctions may deter their exercise almost as potently as the actual imposition of sanctions.' " *Aptheker v. Secretary of State,* 378 U.S. 500, 516 (1964).

The "alternatives" test--the insistence upon narrow and precise standards at least until it is shown that a broader exercise of power is necessary to combat an evil--does not, this Court has recently held, give way even to assertion of a paramount interest in the nation's security or to invocation of the "war power." *United States v. Robel,* 389 U.S. 258, 263-68 (1967). See also concurring opinion of Brennan, J., 389 U.S. at 269.

2. Irrespective of Any First Amendment Claim, the Regulations Are Void for Vagueness.

While commentators have noted that different standards govern questions of vagueness when the first amendment is not at stake, *e.g.,* Amsterdam, *The Voidfor-Vagueness Doctrine in the Superme Court,* 109 U. Pa. L. Rev. 67, 75 (1960); Collings, *Unconstitutional Uncertainty,* 40 Cornell L. Q. 195, 218-19 (1955), this Court has insisted that every penal regulation--or every regulation the violation of which carries potential penal sanctions--adequately inform those subject to it ***42** that certain conduct is proscribed and provide ascertainable standards by which guilt or innocence may be judged. *Lanzetta v. New Jersey,* 306 U.S. 451 (1939); *Connally v. General Constr. Co.,* 269 U.S. 385 (1926); *Giaccio v. Pennsylvania,* 382 U.S. 399 (1966); *Screws v. United States,* 325 U.S. 91 (1943).

As the court noted in *Eisdorfer, supra,* the delinquency regulations provide no warning to the potential violator, and no ascertainable standards of guilt. First, the board may or may not act upon a given violation, and is given no standards to use in making that determination. Second, no requirement that the failure to perform a duty be "wilful" or "intentional" interposes itself to limit the board's discretion. *Cf. Screws v. United States, supra.*[FN24] The registrant declared delinquent finds himself caught up in a penal regulatory system quite beyond his control, in which he is unable to predict the sort of reply which the System will make to any procedural response of his.

FN24. In order for a violation of "duty" to be criminally punished, as opposed to being the subject of a declaration of delinquency, it must be wilful. *United States v. Haug,* 150 F. 2d 911 (2d Cir. 1945). A substantial interest of the System must be shown to have been infringed, precluding prosecution of a registrant for, for example, a false statement on which, at the time he made it, he said he did not intend to rely. *United States v. Rubinstein,* 166 F. 2d 249, 257 (2d Cir.), *cert. denied,* 33 U.S. 868 (1948). Substantial compliance with, rather than literal adherence to, System duties is sufficient under the criminal penalty sections of the Act. *Bartchy v. United States,* 319 U.S. 484 (1943).

Nor is the registrant easily able to predict what kinds of duties may lead to imposition of delinquency status. Granted, the statute does make it his "duty" to keep the board informed of changes of address, Military Selective Service Act of 1967 § 15(b), ***43**50 U.S.C. App. §465 (b), and the regulations explicity make it his "duty" to report for a physical examination when ordered, 23 C.F.R. § 1628.16(1969). However, the regulations dealing with possession of registration certificates and notices of classification do not contain the word "duty", and one commentator has argued based upon the history of these provisions that they do not impose a "duty" the violation of which may permissibly result in criminal prosecution. Dranitzke, *Possession of Registration Certificates and Notices of Classification by Selective Service Registrants,* 1 Sel. Serv. L. Rep. 4029 (1968), discussed at I, F, *infra.* Whatever the merits of this argument, a serious constitutional question is raised by a system of regulation which attaches severe consequences to a failure to obey indefinite commands.[FN25] See, *e.g., United States v. Robel,* 389 U.S. 258, 281-282 (1967) (Brennan, J., concurring).

FN25. The question of what kinds of duties the regulations define so as to give rise to criminal penalties for violation has not been discussed extensively in the cases. See, *e.g., United States v. Lembo,* 76 F. Supp. 209 (E.D. Pa.), *aff'd. sub nom. United States v. Aleli,* 170 F. 2d 18 (3d Cir. 1948). *Cf. Mogall v. United States,* 333 U.S. 424 (1948).

Here, in short, is a system of regulatory commands which leaves men of common intelligence to guess not only at the meaning of the rules they are to follow but at the procedural devices which they must use to defend themselves against a charge of violation and to mitigate the consequences of a finding by the board that a "duty" has been ignored or violated. Such a system cannot withstand constitutional scrutiny. *Connally v. General Constr. Co., supra; Cramp v. Bd. of Publ. Instr.,* 368 U.S. 278 (1961). See generally Amsterdam, *The Voidfor-Vagueness Doctrine in the Supreme Court,* 109 U. Pa. L. Rev. 67 (1960).

***44** E. The Delinquency Regulations Are Void Because They Authorize Deprival of Liberty Without Procedural Due Process of Law.

The delinquency regulations, as extensively discussed at I, A, *supra,* provide that a registrant's deferment or exemption is to be taken away. If he is already in a class available for service, he is accelerated for induction in violation of the order of call provisions normally followed. These benefits are taken away after a determination by the local board that the registrant has violated some "duty." Yet, a registrant who has a deferment or exemption is accorded only the most cursory review of his case by the Selective Service System, and the registrant who is at the time of the delinquency declaration in a class available for service gets no review at all. See I, A *supra.* Whether or not the declaration of delinquency is considered to be "punishment," the regulations are void because they do not provide the due process of law which this Court has customarily insisted upon as prerequisite to deprival of governmental benefit. This contention is argued below in the alternative:

1. The Delinquency Regulations, on Their Face and as Applied, Impose Punishment in Violation of Procedural Due Process of Law.

In 1940, when the regulations served merely a reporting function, and in 1942 (as a result of the December 1941 change discussed at I, A, 3 *supra*), when they arguably served a function analogous to the civil contempt power under clearly defined standards, their remedial character[FN26] perhaps excepted them from the ***45** normal requirements of due process. Today, the breadth of the regulations and the manner of their use by the Selective Service System leaves no doubt that they are punitive under the tests applied in the decisions of this Court.

FN26. And perhaps, the gravity of a wartime situation in which many liberties were for the moment undone. See *Hirabayashi v. United States,* 330 U.S. 81 (1943).

First, the delinquency regulations do not provide for revocation of a benefit upon grounds related to the merits of granting of it in the first place. They are used to deal with all manner of violations of the regulations, from turning in draft cards to failure to report changes of address, to (in recent times) vocal opposition to the foreign policy of the United States. See *Nat'l Students Ass'n v. Hershey,* ..... F. 2d ....., 2 Sel. Serv. L. Rep. 3030 (D.C. Cir. 1969). They are not simply rules such as those customarily and logically related to the grant or denial of a benefit or license, but serve--on their face and as applied--a broader interest in punishing "infractions."[FN27] Indeed, the correspondence between the Justice Department and the Selective Service System set out in the Appendix at 39-43, and the letter from the Selective Service System National Headquarters set out in Supplemental Brief in Support of Petition for Certiorari in this case and in Nos. 1114 and 1175, O.T. 1968, show the punitive intent with which the System administers the delinquency regulations. This use of the regulations, going far beyond the needs of any possible "alternative" nonpunitive purpose, *Kennedy v. Mendoza-Martinez,* 372 U.S. at 168, render the regulations punitive under the test set out in *Cummings v. Missouri,* 71 U.S. *277 (1866),* and approved in *Kennedy,* 372 U.S. at 169 n. 27-29.

FN27. Hershey, Legal Aspects of Selective Service 46-47 (1969), quoted *supra* at I, B.

***46** Moreover, the regulations are used to fulfill the historic purposes of punishment-retribution and deterrence. *Kennedy v. Mendoaza-Martines,* 372 U.S. at 168. Their retributive character may be seen in their failure to provide for remission of delinquency other than in the local board's untrammeled discretion, thus permitting use of the delin-

quency power to sanction past conduct which the registrant can in no way repair, remit or undo. Retributive zeal fairly shines through the System's use of the delinquency power under the circumstances present in *Nat'l Students Ass'n v. Hershey,* ..... F. 2d ....., 2 Sel. Serv. L. Rep. 3030 (D.C. Cir. 1969) and *Wolff v. Selective Service Local Bd. No. 15,* 372 F. 2d 817 (2d Cir. 1967). The widely-publicized abuse in *Wolff,* and the prescription for punishment declared void in the *Student Association* case, gain the delinquency power a fearsome deterrent effect. Papers all across the land published the letter and Local Board Memorandum which were the basis for the boards' action in this case and in *Breen,* chilling dissent by all but the hardiest among the nation's 36 million selective service registrants.

Another of the *Mendoza-Martinez* tests of a punitive sanction, 372 U.S. at 168, is whether it "comes into play only on a finding of scienter." In the midst of World War II, as noted at I, B, 2, *supra,* delinquency was not curable if the local board made a finding of scienter. One may surmise that local boards are still influenced to some degree by their perception of the registrant's intent, but the standardlessness of the regulations and the absence of any requirement that the board make findings of fact renders it impossible to say that scienter is *required* in every declaration of delinquency.***47** The Act requires scienter for a finding of guilt in a criminal prosecution for failure to perfrom a duty, however, see note 24 *supra,* and it would be odd indeed to permit the sweeping breadth of the regulations to argue for their nonpunitive character when their punitive potential and retributive administration otherwise appear.

Finally in assessing the punitive character of the regulations, the Court should note the character of the sanction imposed--loss of liberty. This case does not involve a mere money penalty--although *Lipke v. Lederer,* 259 U.S. 557 (1922), teaches that a money exaction may yet be invalid as a penalty imposed without proper safeguards. Rather, at issue in these cases is involuntary confinement of one who would not otherwise be called to serve or who would at the least have a greater or lesser period of time at large during which he might become eligible for a deferment or during which the war or conscription or both might be halted.

In short, the Court cannot ignore in this case any more than in *Leary v. United States,* 394 U.S. .... (1969), the plain truth: This system of rules, like that in *Leary,* is enacted in aid of the prosecutive function of government and just as surely as that at issue in *Leary* constitutes an attempt to shortcut the essential safeguards which the Bill of Rights places around a criminal trial. A crucial difference is this: In *Leary* the rules and statutes in question sought to shorten the trial by making the defendant the instrument of his own conviction; the delinquency regulations propose to eliminate the trial altogether. *Cf.* Wright, Book Review, 78 Yale L. J. 338 (1968).

***48** The regulations do provide for notice of delinquency. 32 C.F.R. § 1642.4 (1969). See Appendix at 44. However, no particular form of notice is required. The sixth amendment requires apprisal in a criminal case. See *Russell v. United States,* 369 U.S. 749 (1963). A registrant reclassified as a delinquent will have a personal appearance before the local board (if, that is, he can afford to travel to the local board). See note 6 *supra.* Those who, like petitioner Gutknecht, are already in a class available for service have no such right. In neither case will the registrant have the right to confront and cross-examine the witnesses against him, a right which he would have if tried on a criminal charge. See *Pointer v. Texas,* 380 U.S. 400 (1965).

By contrast, the local board is free to rely upon whatever rumor, report or hearsay may have found its way into the registrant's selective service file. See 32 C.F.R. § 1623.1(b) (1969); Sel. Serv. L. Rep., Practice Manual ¶¶ 1072-76. The right to counsel is guaranteed every criminal defendant in a criminal case, *Johnson v. Zerbst,* 304 U.S. 458

(1938); *Gideon v. Wainwright,* 372 U.S. 335 (1963), from the moment he is formally charged, *Massiah v. United States,* 377 U.S. 201 (1964), or placed in custody, *Miranda v. Arizona,* 384 U.S. 436 (1966). The Selective Service regulations are generally interpreted to deny the registrant counsel. 32 C.F.R. § 1624.1(b) (1969). The criminal defendant will have compulsory process for obtaining witnesses in his defense, but the local board is the only party to a delinquency proceeding with the subpoena power. 32 C.F.R. § 1621.15 (1969). The local selective service board has "discretion" whether to hear witnesses. 32 C.F.R. § 1624.1(b) (1969); ***49***Uffleman v. United States,* 230 F. 2d 297* (9th Cir. 1956); *Harris v. Ross,* 146 F. 2d 355 (5th Cir. 1944). Every accused in a criminal case is guaranteed a public trial, U.S. Const., 6th amendment; *In re Oliver,* 333 U.S. 257 (1948), yet the local board may or may not admit a registrant's friends and family, let alone the press and the general public. 32 C.F.R. § 1624.1 (b) (1969).[FN27a]

FN27a. The delinquency regulations do not provide that a registrant's silence may not be used as the basis of an adverse inference, or for *jury* trial or indictment by a grand jury.

In short, if the delinquency regulations impose punishment, they do so without any of the safeguards which must accompany the imposition of punishment. They are, therefore, void. *Kennedy v. Mendoza-Martines, supra.*

2. Even if the Delinquency Regulations Do Not Impose Punishment, They Are Invalid for Failure to Provide Procedural Due Process of Law.

Perhaps the Court will hold that the delinquency regulations do not impose punishment but merely condition the continued enjoyment of a benefit upon compliance with every requirement of the Selective Service regulations which the wit of a local board can classify as a "duty." If so, the regulations are nonetheless invalid, for even governmental benefits customarily (though mistakenly) denominated "privileges" may not be taken away by a method or under a standard which the Bill of Rights interdicts. *Sherbert v. Verner,* 374 U.S. 398 (1963); Van Alstyne, *The Demise of the Right-Privilege Distinction In Constitutional Law,* 81 Harv. L. Rev. 1439 (1969); Linde, *Justice Douglas on Freedom in the Welfare State: Constitutional Rights in the Public Sector,* 39 Wash. L. Rev. 4 (1964), 40 Wash. L. Rev. 10 ***50** (1965); O'Neil, *Unconstitutional Conditions: Welfare Bendfits With Strings Attached,* 54 Calif. L. Rev. 443 (1966). The question whether a board may apply the delinquency regulations based upon improper substantive criteria was at issue in *Oestereich v. Selective Service Board,* 393 U.S. 233 (1968), and is discussed *infra* at I, F. At this point, however, petitioner relies upon the cases holding that a benefit or license may not be taken away without observance of the minimal constitutional decencies of notice and hearing. See *Greene v. McElroy,* 360 U.S. 474 (1959); *Int re Ruffalo,* 390 U.S. 544 (1968) Van Alstyne, *supra,* 81 Harv. L. Rev. at 1451-54.[FN27b] At a minimum, these authorities teach that such elementary rights as confrontation and cross-examination as to essential facts, *Greene v. McElroy, supra,* notice of charges, *In re Ruffalo, supra,* and (where the potential sanction is serious) proof beyond a reasonable doubt, *Woodby v. I & NS,* 385 U.S. 276 (1966), are required. Whether such rights as counsel, public trial and compulsory process are required in an administrative proceeding of this character is less settled, but cases in this court involving noncriminal proceedings terminating in sanctions no more severe than in a delinquency proceeding suggest that such protections are imperative. See, *e.g., in re Gault,* 387 U.S. 1 (1967); *In re Oliver,* 333 U.S. 257 (1948); *In re Murchison,* 349 U.S. 133 (1955). *Cf. Garrity v. New Jersey,* 385 U.S. 493 (1967); *Kennedy v. Mendoza-Martinez, supra.* And lower courts have consistently held administrators to high standards of due process ***51** performance. See, *e.g., Dixon v. Alabama St. Bd. of Educ.,* 294 F. 2d 150 (5th Cir. 1961); Symposium, *Student Rights and Campus Rules,* 54 Calif. L. Rev. 1 (1966).

FN27b. See also *Kelly v. Wyman,* 294 F. Supp. 893 (S.D.N.Y. 1968), *prob. juris. noted sub nom. Goldberg v. Kelly,* 37 U.S. L.W. 3399 (Apr. 21, 1969).

The imposition of these procedural requirements is, in fact, indispensable to ensuring that improper substantive criteria are not used, or proper substantive criteria are not wrongly applied, in stripping those otherwise eligible of their rights under statute or regulation.[FN28] The boards' denial of these elementary protections invalidates their actions, and the regulations' failure to call for them makes them constitutionally infirm.

FN28. Indeed, the boards' failure here and in *Breen* to assign formal reasons for their decisions should lead to invalidation of the board orders without more. *SEC v. Chenery Corp.,* 318 U.S. 80 (1943).

F. Use of the Delinquency Power to Reclassify Petitioner and Accelerate His Induction Infringed Upon the First Amendment.

1. Under the Facts of This Case, it Is Impossible to Determine Whether the Local Board Acted in Partial Reliance Upon an Invalid Directive From the Director of Selective Service and the Conviction Must Therefore Be Reversed.

The October 24, 1967 directive from General Hershey, the Director of Selective Service (Appendix B, *infra*), mandated local draft boards to use the delinquency power to punish dissent. While portions of the directive dealt with destruction and mutilation of selective service certificates, other portions dealt with reclassification based upon participation in demonstrations which a local board found to be "illegal."

***52** The reclassifications in this case and in *Breen,* No. 65 were apparently premised upon the Hersehy directive, so closely did they follow upon its distribution. In *Breen,* the complaint alleges board reliance upon the directive, and the government has moved to dismiss, thereby admitting the allegation. *Oestereich v. Selective Service Board,* 393 U.S. 233, 235 n.3 (1968). Since no trial on the merits has been held, the point must be taken to have been established. In Gutknecht's case, the correspondence between the State Director and the United States Attorney, Appendix 4143, which sets out the information before the draft board, indicates that the board at least had evidence before it of constitutionally protected conduct by Gutknecht in which he engaged simultaneously with his abandonment of his Selective Service certificate.

Moreover, the local boards in both cases expressed their reclassification decisions as a "general verdict" of "I-A delinquent" and "ordered to report for induction" without explanation of the grounds upon which the decision was reached. Thus, irrespective of whether a draft card turn-in is constitutionally protected, such conduct cannot be made the subject of punishment when brigaded with clearly-protected speech unless the trier of fact clearly spells out the grounds upon which he acts and indicates nonreliance upon a constitutionally impermissible ground. See *Street v. New York,* ..... U.S ..... (1969), and cases there cited; *Sicurella v. United States,* 348 U.S. 385 (1955).

Nor does it matter that in each case the board issued a delinquency notice setting out the registrant's failure to possess his selective service certificates (Appendix, p. 44). For *Street* makes clear that the crucial***53** test is the content

of the *verdict* in question rather than of the charge. This principle is not only an essential attribute of any fair administrative procedure, see *SEC v. Cheery Corp.,* 318 U.S. 80, 94 (1943), but is necessary to the protection of the first amendment liberties at stake here. The Court has recognized this principle in a related context. In *Sicurella v. United States,* 348 U.S. 385 (1955), an erroneous view of the law in a nonbinding recommendation of a Justice Department official invalidated the action of the appeal board to which the recommendation was made. The Court could not tell whether and to what extent the board might have been influenced by the error. So here, the Hershey directive so poisons the record in these cases that only invalidation of the boards' orders, followed by relitigation if the boards wish it, will cure the error.

The reclassification and priority induction of Gutknecht and Breen may also be seen to fall afoul of the first amendment by reference to the integral interrelationship between the Hershey directive and the socalled "possession regulations," 32 C.F.R. §§1617.1, 1623.5 (1969). The directive is aimed at suppressing speech; it and the possession regulations thus form, in the context of protest-motivated draft card turn-ins such as are involved in this case and *Breen,* an incomminutable system of regulation which is overly broad and vague and therefore is unconstitutional under *Stromberg v. California,* 283 U.S. 359 (1931). *Stromberg,* as interpreted in Chief Justice Warren's opinion for the Court in *United States v. O'Brien,* 391 U.S. 367 (1968), "struck down a statutory phrase which punished people who expressed their 'opposition to organization***54** government' by displaying 'any flag, badge, banner, or device.' Since the statute there was aimed at suppressing communication it could not be sustained as a regulation of noncommunicative conduct." 391 U.S. at 382. Thus, the *O'Brien* opinion sees *Stromberg* not essentially as a case upholding the right of "symbolic speech," but rather as one of statutory overbreadth. Here, too, the regulations at issue and the Hershey directives construing them constitute an overbroad and vague set of proscriptions which the Court should strike down in its entirety rather than rewriting. See *Alptheker v. Secretary of State,* 378 U.S. 500, 516 (1964).[FN29]

> FN29. We trust the Court will not pause to consider any argument that the Dirctor's October 1967 letter and Local Board Memorandum have no legal effect. In fact they have been relied upon by local boards, and though they are not of binding force, local boards may use them for guidance. See *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275 (1946); *Nat'l Student Ass'n v. Hershey,* ..... F.2d ....., 2 Sel. Serv. L. Rep. 3030 (D.C. Cir. 1969).

2. Turning in One's Own "Draft Cards" as a Gesture of Peaceful Protest Is Conduct Protected by the First Amendment.

If the Court should not accept the argument tendered in I, E, 1, *supra,* it will become necessary to confront the crucial constitutional question left open in *United States v. O'Brien,* 391 U.S. 367 (1968), and decide whether or not a registrant who turns in his draft card in peaceful protest against American policy may claim the protection of the first amendment.

Certainly the draft card turn-ins here were peaceful and orderly. They did not constitute a threat to passers-by or an obstruction of traffic or of the normal functioning***55** of any person or agency in any direct or immediate sense. It is such common-sense considerations which have led this Court to permit reasonable regulation of speech brigaded with arguably nonprotected "nonspeech" conduct. See, *Bakery Drivers Local v. Wohl,* 315 U.S. 769, *776* (1942), for

Justice Douglas' enduringly cogent discussion of the rationale for such regulations. On the other hand, the interest in peaceable, effective, demonstrative speech has led this Court and others to say that right to picket, to take a recurrent example of "speech plus", may override local trespass laws of general application. *Amalgamated Food Employees v. Logan Valley Plaza, Inc.,* 391 U.S. 308 (1968); *Schwartz-Torrance Investment Corp. v. Bakery & Confectionary Workers Union,* 61 Cal. 2d 766, 394 P. 2d 921 (1964). The governing principles in the "speech plus" cases have not been stated in terms which admit of easy generalization. But in *O'Brien,* the Court restated the governing criteria in cases like the present one, and iterated that the governmental interest in suppressing the nonspeech elements of an integrated course of conduct involving speech must be sufficiently strong to override the speaker's interest in communicating. See 391 U.S. at 376-377. This balancing of interests is not easy to perform, but an examination of the relative interests of the petitioners here and in *Breen* and of the government leads, it is suggested, to vindication of the free speech claim in these two cases.

Petitioners Gutknecht and Breen, like many other young Americans, acted dramatically in October and November 1967 to focus attention upon the war in Vietnam and the use of the conscription power to raise an ***56** army to fight it. It was a time of dissent and protest, and of attempts to influence a government which seemed distant and unamenable to change. An eminent group of professional men has recently referred to "the massive anonymity of government and the unmanageability of the social system" in a study of the disturbances at Columbia University. Crisis at Columbia: Report of the Fact-Finding Commission Appointed to Investigate the Disturbances at Columbia University 194 (Vintage ed. 1968). See also Mailer, Miami and the Siege of Chicago (1968); Barron, *An Emerging First Amendment Right of Access to the Media?,* 37 Geo. Wash. L. Rev. 487 (1969). In the setting of American politics in the months before Senator Eugene McCarthy entered the Presidential race, the percipient man can well say that the dramatic and controversial conduct of the antiwar and antidraft movements indispensably and indisputably pushed the issues of war and conscription to the forefront of public debate. See Sandalow, Book Review, 67 Mich. L. Rev. 599, 608-12 (1969); Velvel, *Protecting Civil Disobedience Under the First Amendnment,* 37 Geo. Wash. L. Rev. 464, 481483 (1969). This interest in communication is at least as important of the interest of the unions in the *Logan Valley* and *Schwartz-Torrance* cases, *supra,* in moving from the outer perimeter of the respective shopping centers to the walkways on which their picket signs and leaflets would be noticed by passersby. What countervailing governmental interest could be said to have been infringed by their conduct ?[FN29a]

> FN29a. The surrender of the certificates amounted as well to a form of petition. The right to petition, as guaranteed by the first amendment, involves of necessity some tangible signification or sign of protest, that is, *conduct.*

***57** We begin with the proposition that the nation is not now at war, without conceding that declaration of war diminishes at all the force and primacy of first amendment rights. Compare *Schenck v. United States,* 249 U.S. 47 (1919), with Meiklejohn, Free Speech and Its Relation to Self-Government *27* (1948). Of what use are draft cards to a peacetime system of conscription? They perform receipt and record-keeping functions, as the Court noted in *O'Brien,* 391 U.S. at *78-79.* If one is stopped on the street without his registration certifcate, and if the officer who stops him has. reason to conduct a search, failure to show the certificate gives rise, as 32 C.F.R. § 1617.1 (1969) says, to a presumption of failure to register--a crime under § 12(a) of the Military Selective Service Act of 1967. The possession requirement is, therefore, a convenience to the *registrant.* No legitimate interest of government served by imposing a broader consequence to failure to carry the certificate than the presumption established by the regulation. *Cf. United States v. Robel,* 389 U.S. 258 (1967). In time of war or total mobilization, perhaps men will be drafted

from the streets; however, during every time of crisis during which the institution of conscription has existed in this country in its present form--that is, since 1917[FN30]--local boards have been able to more than meet their quotas by *mailing* induction orders to registrants at their last known addresses, aided by the requirement of notification of change of address in § 15(b) of the Act. 50 U.S.C. App. § 465(b). (It should also be noted that no one has ever asserted that registrants must literally comply with the possession requirement, for example, while showering or swimming.)

FN30. See Sel. Serv. L. Rep., Practice Manual ¶ 2.

***58** It cannot, therefore, be said that the governmental interest in possession of draft cards by registrants is "paramount," *Thomas v. Collins,* 323 U.S. 516, 530 (1945), particularly given the existence of a system of statutory regulation designed to ensure the continuing availability of certificates through imposition of criminal penalties for their wilful destruction or mutilation. *United States v. O'Brien, supra.* In short, there is no reason--no precise, commonsense, nonsuppositious, nonhypothetical reason grounded in demonstrable fact--for overriding the first amendment contention of the petitioners in this case. There is not even a cogent argument proceeding from considerations of administrative convenience, let alone a "clear and present danger of a serious substantive evil that rises far above the public inconvenience, annoyance or unrest." *Terminiello v. Chicago,* 337 U.S. 1, 5 (1949).[FN31]

FN31. In making the above argument, petitioners assume that this Court has now rejected the view that, when a balancing test is appropriate, the government may rely upon some abstract and hypothetical interest in "national security" or the "war power" as a balance weight against freedom. This sort of balancing, criticized in Frantz, *The First Amendment in the Balance,* 71 Yale L. J. 1424 (1962); Frantz, *Is the First Amendment Law?,* 51 Cal. L. Rev. 729 (1963), results almost inevitably in the defeat of the "private" interest at stake and was not favored in, *e.g., United States v. Robel,* 389 U.S. 258 (1967).

Therefore, the nonpossession regulations, as applied to the conduct of petitioners here and in *Breen,* are unconstitutional as in violation of the first amendment.

***59** G. The Declaration of Delinquency and Acceleration of Induction in This Case Were Not Authorized by the Military Selective Service Act of 1967 and the Selective Service Regulations.

1. Oestereich v. Selective Service Board, 393 U.S. 233 (1968), Requires Reversal.

This Court, in *Oestereich,* harmonized the delinquency regulations with the registrant's statutory right to a divinity student exemption under § 6(g) of the Military Selective Service Act. The basis for the Court's holding is of crucial importance in this, case:

"There is no suggestion in the legislative history that, when Congress has granted an exemption and a registrant meets its terms and conditions, a Board can nonetheless withhold it from him for activities or conduct not material to the grant or withdrawal of the exemption. So to hold would make the Board's freewheeling agencies meting out their brand of justice in a vindictive manner.

"Once a person registers and qualifies for a statutory exemption, we find no legisltive authority to deprive him of that exemption because of conduct or activities unrelated to the merits of granting or continuing that exemption....

"We deal with conduct of a local board that is basically lawless.... In such instances, as in the present one, there is no exercise of discretion by a Board in evaluating evidence and determining whether a claimed exemption is deserved. The case we decide today involves a clear departure by the Board from its statutory mandate....
***60** "... [T]he scope of the statutory delinquency concept is not broad enough to sustain a revocation of what Congress has granted as a statutory right, or sufficiently buttressed by legislative standards..." 393 U.S. at 237-38.

The parallels between this case and *Oestereich* may be seen by a brief examination of the statutory and regulatory standards governing petitioner Gutknecht's status at the time of the declaration of delinquency. The order of call provisions governing his status are discussed at I, A, 1 and I, B, *supra,* and that description need not be repeated here. The standards governing the "order of call", like those governing ministerial exemptions, are prescribed by the Congress and require no exercise of discretion by the local board. The great Congressional concern with order to call was expressed as recently as 1967, in an amendment to § 5(a) of the Act, 50 U.S.C. App. § 455(a), designed to prohibit the President from establishing a random selection system and to preserve the "oldest first" order of call system then (as now) in effect. H.R. Rep. No. 346, 90th Cong., 1st Sess., at 9-10 (1967). Of course, even if the order of call provisions of 32 C.F.R. § 1631.7 (a) were not mandated by the Congress, the Executive Branch is constitutionally interdicted from departing from its own regulations, so a serious constitutional question is raised by the application of the delinquency regulations to sanction abrogation of precise rules of general application. See *Vitarelli v. Seaton,* 359 U.S. 535 (1959) ; *Service v. Dulles,* 354 U.S. 363 (1957).

Next, here as in Oestereich the delinquency power was invoked for reasons unrelated to the merits of ***61** Gutknecht's placement in a relatively low position in the order of call. Here as in *Oestereich* there are no legislative standards which approve or guide the use of the delinquency power; the available legislative expression of intent does not appear to envision this use of the power.

For the foregoing reasons, as well as for those spelled out at greater length in the portion of the brief in *Breen,* No. 65, devoted to analysis of *Oestereich,* the delinquency regulations were misapplied in this case.

2. Possession by a Registrant of His Registration Certificate and Notice of Classification Is Not a "Duty", Violation of Which May Permissibly Result in Application of the Delinquency Regulations.

The author of Dranitzke, *Possessions of Registration Certificates and Notices of Classification by Selective Service Registrants,* 1 Sel. Serv. L. Rep. 4029 (1968) has documented, based upon the history of the possession requirement that nonpossession of registration certificates and notices of classification is not punishable under § 12 of the Military Selective Service Act of 1967, 50 U.S.C. App. § 462. The article argues that even the ostensible authorization in § 12(b)(6), making a felon of one "who knowingly violates or evades any of the provisions of this title or rules and regulations promulgated pursuant thereto relating to the issuance, transfer or possession of such certificate," refers only to wrongful possession or wrongful transfer of draft cards with regard to forgery and false identification. 1 Sel. Serv. L. Rep. at 4039.

Regardless of whether or not § 12(b)(6) makes it a crime not to possess one's cards, however, it is clear that ***62** § 12(a)'s generalized prohibition against failing or neglecting or refusing to perform any "duty" under the Act or regulations, which language is also used in 32 C.F.R. Part 1642 as the basis for the delinquency power, does not create a

nonpossession offense. First and most obviously, § 12(a) could not be said to create an offense which the government has consistently claimed (and some courts have held), was created by § 12(b) (6). See, *e.g.,* *United States v. Miler,* 367 F. 2d 72, 75 (2d Cir. 1966), *cert. denied,* 386 U.S. 911 (1967); *O'Brien v. United States,* 376 F. 2d 538 (lst Cir. 1967), *rev'd on other grounds,* 391 U.S. 367 (1963). Petitioner need not concede that nonpossession is an offense at all; he argues only that which is perfectly clear: *If* nonpossession is an offense, it is only because § 12(b) (6) makes it so, and this under accepted canons of statutory construction:

"However inclusive may be the general language of a statute, it 'will not be held to apply to a matter specifically dealt with in another part of the same enactment.... Specific terms prevail over the general in the same or another statute which might otherwise be controlling.' " *Fourco Glass Co. v. Transmirra Prod. Corp.,* 353 U.S. 222, 228-29 (1957).

Therefore, since possession is not a "duty" under § 12 (a), it is not a "duty" under Part 1642 of the Regulations. *Wolff v. Selective Service Board No. 15,* 372 F. 2d 817 (2d Cir. 1967).

In addition, the author of the article cited above takes care to demonstrate that the possession requirement has in any case never been expressed in terms ***63** which make it a mandatory, punishable duty. The regulations in question, 32 C.F.R. §§ 1617.1, 1623.5 (1969), do not contain either the word "duty" or the word "shall" and are otherwise barren of words suggesting an intention to attach penalties to their disregard.

It must for these reasons be clear that whatever the meaning of "duty," it does not stretch far enough to reach the conduct of petitioners Gutknecht and Breen.

3. The Delinquency Regulations, if Not Invalid Must Be Subjected to a Limiting Construction Not Employed by the Local Board in This Case.

The petitioner in *Oestereich* argued that if the delinquency regulations are valid at all, it must be as a standardized compliance-securing machinery, limited in application to enforcement of duties relevant to the classification process, providing for automatic remission of delinquency in the event of renewed compliance by the registrant, and accompanied by sufficient procedural protections to ensure due process of law. See generally Griffiths, *Punitive Reclassification of Registrants Who Turn In Their Draft Cards,* 1 Sel. Serv. L. Rep. 4001 (1968). Such an interpretation of the regulations as a means of saving them from a determination of unconstitutionality would require, petitioner has contended, rewriting them. See *Aptheker v. Secretary of State,* 378 U.S. 500 (1964). But if the Court should not accept the arguments made above, the necessity will remain to impose some limits upon the exercise of the delinquency power. The job was begun in *Oestereich.* To continue it, petitioner suggests, first, that the delinquency regulations must come to be seen as analogous to civil contempt. The delinquency regulations may be ***64** seen to permit such an interpretation. They provide for expunging delinquency and indeed relax the ordinary rule that reopening of a registrant's classification cannot be had after issuance of an order to report for induction, thereby allowing a registrant to conform to the System's requirements right up to the last moment. The registrant is not bound by his waiver of procedural rights until the moment he is in the armed forces. Upuntil that moment he can, by cooperating with the procedures which enable his local board to make appropriate classification decisions, receive consideration of his claim that he should not be considered available for immediate induction. See 32 C.F.R. § 1642.14(b). The Delinquency Notice (SSS Form No. 304) itself requests the registrant to contact his local board at

once, obviously with an eye to clearing up the alleged default. Indeed, as noted in I, A, 3, *supra,* the World War II provision that a wilful delinquent could not be removed from delinquency status is no longer in effect. Yet here, as in *Breen,* the notice was followed almost immediately by an order to report for induction. See Brief for Petitioner, *Breen v. Selective Service Bd.,* No. 65, O.T. 1969.

If delinquency is a "civil" means of enabling the board to perform its classification functions, it cannot be used against one who does not possess his registration certificate or notice of classification. In no way is the Board's consideration of a registrant's current classification or its ability to communicate with the registrant impeded by the failure to possess these certificates. It follows from the fact that the possession requirement is not an integral part of the relationship between the registrant and his board that it use reclassification***65** as a sanction for nonpossession is to use it as punishment rather than as a "civil" means of enforcing compliance. Such use, given the absence of procedural protections in the System, would be unconstitutional. See I, E, *supra.* See also Griffiths, *supra,* 1 Sel. Serv. L. Rep. at 4009-10 nn. 72-74, 4011.

Nor is there, in this case or in *Breen,* any evidence of a routine tender to the registrants of an opportunity to purge the alleged delinquency, even upon the assumption that nonpossession is a valid basis for invoking the delinquency power. The declarations of delinquency thereby attain the character of punitive measures designed to obtain retribution for a past act which the registrant could in no way repair or undo, rather than civil compliance-securing proceedings. Failure to offer the required procedural right of "purging" the delinquency makes it impossible to speculate on this record whether the registrants would have availed themselves of it.

Finally, the Court should insist upon the observance of the procedural protections spelled out at I, E *supra,* as a precondition to any exercise of the delinquency power by local boards. The denial of procedural rights, *e.g.,* counsel, in Part 1624 of the Selective Service regulations might be held to apply only to personal appearances before the board in nondelinquency contexts, a construction warranted by the placement of these limits in the Part of the regulations dealing with such appearances.

Subject to such limits, the delinquency regulations might be brought under control and made subject to the rule of law rather than to the whim of each of the ***66** nation's 4092 local draft boards. In any event, however, the denial to petitioners here and in *Breen* requires invalidation of the board orders which were at issue in these cases.

II. THE DECISION OF THE COURT OF APPEALS MUST BE REVERSED SINCE NO EVIDENCE WAS PRESENTED AT TRIAL THAT THE PETITIONER EITHER (1) FAILED TO REPORT FOR INDUCTION OR (2) REFUSED TO SUBMIT TO INDUCTION. ALTERNATIVELY, THERE WAS A FATAL VARIANCE BETWEEN INDICTMENT AND PROOF.

The March 1968 indictment of the petitioner charged him with failure to perform a duty required of him by the "Universal Military Training and Service Act" and its attendant rules, regulations and directions "in that he did fail and neglect to comply with an order of his local board *to report for and submit to* induction into the armed forces ..." (Appendix, p. 2, emphasis supplied). A charge of failure to *report* for induction necessitates proof that the defendant knowingly and wilfully failed to appear at the induction center. Both the district court and the court of appeals conceded that the petitioner did report to the induction center. A charge of failure to submit to induction necessitates

proof that the defendant knowingly and wilfully refused to comply with the standard Army procedure for induction prescribed by Army Regulation 601-270, *i.e.,* that, having been informed of the penalties and the nature of the induction procedure, the defendant twice refused to take the symbolic one step forward that would have constituted his induction into the Armed Forces. ***67** Both the district court and the court of appeals conceded that the petitioner was never given an opportunity to take the crucial one step forward.

Since it is perfectly clear from the evidence presented at trial as well as from the opinions of the District Court and the Court of Appeals that the petitioner did report to the induction center, no further discussion of the question of failure to report is necessary: The government failed to prove that the petitioner committed the offense of failure to report. Petitioner turns to a consideration of the alleged "failure to submit."

In draft prosecutions, as in other criminal cases, the prosecution must establish that the crime was committed intentionally and knowingly. 50 U.S.C. App. § 462; *Bartchy v. United States,* 319 U.S. 484 (1943); *Ward v. United States,* 344 U.S. 924 (1953); *Graves v. United States,* 252 F. 2d 878 (9th Cir. 1958); *Venus v. United States,* 266 F. 2d 386 (9th Cir. 1959); *United States v. Rabb,* 394 F. 2d 230 (3rd Cir. 1968); *Silverman v. United States,* 220 F. 2d 33 (8th Cir. 1958). This principle is derived not only from general principles of criminal law but also from the specific use of the word "knowingly" in the statutory provision under which the petitioner was indicted, 50 U.S.C. App. § 462(a).

Recognizing the crucial importance of a demonstration of intent in cases of refusal of induction, the Army has included in Army Regulation 601-270 a procedure for laying a basis for proof of intent through the overt acts of the defendant. Paragraphs 37 and 40 of this Army regulation provide for the two crucial elements of proof of intent to refuse induction: (1) warnings to the draftee of the meaning of the induction ceremony***68** and the penalties for refusal of induction and (2) presentation of the draftee with a choice between two overt patterns of behavior, *i.e.,* stepping across or refusing to step across a symbolic induction line marking the boundary between civilian and military status. See *Billings v. Truesdell,* 321 U.S. 542 (1944). The second element forces the draftee to engage in an overt pattern of behavior that constitutes the offense of refusal and overtly demonstrates the mental state of intent to refuse induction, while the first element limits the draftee's opportunity to claim at trial that he did not understand the nature of his acts. In this case, the petitioner was given no opportunity to carry out his alleged intent to refuse induction by making the irrevocable choice not to take the one step forward.[FN31a]

FN31a. The relevant portions of AR 601-270 read as follows:

"37. *Induction.* a. The following procedure will be followed in the induction of *all registrants* into the Armed Forces:
(1) Registrants who have been determined to be fully qualified for induction in all respects will be assembled. The induction officer will inform them of the imminence of induction, quoting the following:

"You are about to be inducted into the Armed Forces of the United States, in the Army, the Navy, the Air Force, or the Marine Corps, as indicated by the service announced following your name when called. You will take one step forward as your name and service are called and *such step will constitute your induction* into the Armed Forces indicated." [emphasis supplied]

(2) Any registrant who fails or refuses to step forward when his name is called will be removed quietly and courteously from the presence of the group about to be inducted and processed as prescribed in paragraph 40c."

"40. Processing steps for registrants in special categories

FN

c. *Registrants who refuse to submit to induction.* Any registrant who has been removed from the group as prescribed in paragraph 37a(2) and who persists in his refusal to submit to induction will be informed that such refusal constitutes a felony under the provisions of the Universal Military Training and Service Act, as amended. He will be informed further that conviction of such an offense under civil proceedings will subject him to be punished by imprisonment for not more than 5 years, or a fine of not more than $10,000, or both. He will then be informed again of the imminence of induction using the language specified in paragraph 37a(1) and his name and service number again will be called. If he steps forward at this time, he will be informed that he is a member of the Armed Forces concerned, using the language specified in paragraph 37a (3). If, however, he persists in refusing to be inducted, the following action will be taken: [the following material sets forth procedures for taking a signed statement, preparing letters to various authorities, and notifying the U.S. Attorney]"

***69** The reference in paragraph 37a of AR 601-270 to "all registrants" means that the procedure for induction there outlined is the unique method for acceptance or refusal of induction. Paragraph 37a(1) is quite explicit in its declaration that the one step forward *constitutes* induction. (See the italicized portion of paragraph 37a(1), *supra.*) The refusal of no other orders given at the induction center constitutes refusal of induction; only the refusal of the procedures outlined in paragraphs 37 and 40 constitutes refusal of induction.

At the induction center in Minneapolis, the petitioner "indicated" to the military personnel that "he had no intentions to process in any way, such as physical examination or mental" (Appendix, p. 12). He was duly informed of the regulations regarding refusal to process as well as the legal penalties for refusal of induction (*Id.,* pp. 12-13, 21). The petitioner was at no time given an opportunity to accept or refuse an order to take a symbolic step forward into military jurisdiction, as required by AR 601-270 (37)(1); nor was the statement regarding the imminence of induction read to him (*Id.,* pp. 19, 22-23). The District Court in its ***70** opinion conceded that the prescribed induction procedure had not been followed.

Even assuming that one could dispense with the standard one step forward in proving intent, the government suceeded only in proving that the petitioner had indicated an intent to refuse induction; the government was unable to demonstrate that the petitioner refused to take the symbolic one step forward that *constitutes* induction according to AR 601-270(37)(1). If accepted, this evidence would establish no more than the proposition that the petitioner intended to refuse induction but was never given the opportunity to commit the offense by refusing the induction ceremony. Placing this situation within the general context of penal law, one discovers that the petitioner is simply in the position of a party who expressed an intent to commit a crime, but never carried the expressed intent into action because the opportunity did not arise, *e.g.,* an individual who declared that he would shoot any child who came

on his property but never committed the crime of murder because no child ventured on his land. One can easily conceive of the case of a draftee who makes loose statements about refusing induction at the center, but who goes through with induction when confronted with the actual final choice to refuse or accept. In fact, AR 601-270 (40) (c) explicitly recognizes the possibility that a draft resister can change his mind even after having refused once. In such a case, the regulation provides for induction rather than prosecution.

Thus, it is clear that the petitioner could not have been convicted validly either of refusing to report to the induction center or of refusal of induction on the basis ***71** of the evidence presented by the government at trial. It is possible that a charge of refusing to obey the orders of representatives of the Armed Forces at the induction center might have been more appropriate to the government's proof. (See 50 App. U.S.C. § 462(a) 32 C.F.R. § 1632.14(4) (January 1, 1969); and T. 23).[FN32] However, even if the proof at trial could be tortured into a showing that the petitioner failed to obey the lawful orders of military personnel at the induction center, the indictment did not charge him with that offense and he was therefore given no opportunity to defend against a charge that he committed it. Such a variance between indictment and proof was condemned in *Stirone v. United States,* 361 U.S. 212 (1969); *cf. Russell v. United States,* 369 U.S. 749 (1962). An indictment for violation of the provisions of 32 C.F.R. § 1632.14(b) would, petitioner contends, be required under the decisions of this Court to spell out the precise offense with which petitioner was charged, including if necessary to apprise him properly the regulation upon which the government would rely at trial. See *Russell v. United States, supra.*

> FN32. Even with such a charge, the government would have been proceeding on a very weak foundation of proof of intentional commission of the offense. No evidence from the trial establishes that the petitioner in fact refused to process. One has only his alleged statement that he would not. Certainly the Army would have been required to present the petitioner with the materials or personnel for the physical and mental tests before the refusal would have reached the level of a concrete act. And the Army Regulations bear out this interpretation. AR 601-270 (40 (c)(4) provides specifically for inductees who refuse to take the preinduction tests and examinations. They are to be told that their acts constitute violations of law.

In any case, however, through the Army's failure to follow its own regulations that simplify the task of the government in proving commission of the offense with ***72** intent, the petitioner never reached the stage where he could have committed the offense of refusing to submit to induction. This failure to follow procedural rules established for the draftee's protection requires reversal. See *Vitarelli v. Seaton,* 355 U.S. 535 (1959); *Cox v. Louisiana,* 379 U.S. 559 (1965).[FN32a] Support for the foregoing view is provided by *United States v. Kroll,* 402 F. 2d 221, 222-23 (3rd Cir. 1968):

> FN32a. The Army Regulations, including AR 601-270, were promulgated under the authority of the Assistant Secretary of Defense (Manpower) and the Department of the Army as Executive Agent for the Department of Defense on August 2, 1965. As the opinion in *Chernekoff v. United States, supra* at p. 724, declared, the Army Regulations on induction procedures were promulgated to fill a gap left by the Code of Federal Regulations. They are not mere technicalities that the Army can dispense with as it pleases. Either the Army must induct according to its own regulations and those of the Selective Service System or it cannot induct at all. This was pointed out in *Briggs v. United States,* 397 F. 2d 370, 373 (9th Cir. 1968): "Army Regulations, like selective service regulations, constitute part of the procedural framework governing in-

duction." See also *United States v. Kroll,* 402 F. 2d 221 (3rd Cir. 1968); *Edwards v. United States,* 395 F. 2d 453 (9th Cir. 1968), *cert. den.,* 393 U.S. 845 (1968); and *Parrott v. United States,* 370 F, 2d 388 (9th Cir. 1966), *cert. den.,* 387 U.S. 908 (1967).

"First, we concur in the view expressed in Chernekoff v. United States, 219 F.2d 721 (C.A. 9, 1955), that a registrant is not guilty of a crime until he has been given the prescribed warning concerning penalties and refuses to step forward for the second time. See also, United States v. Kurki, 384 F.2d 905 (C.A. 7, 1967), cert. denied, 390 U.S. 926 (1968); Parrott v. United States, 370 F.2d 388 (C.A. 9, 1966), cert. denied, 387 U.S. 908 (1967). The purpose behind A.R. 601-270 is to give a registrant a chance to change his mind and to afford him one last opportunity to avoid committing a Federal crime. Were we to make the ***73** assumption that appellant committed a crime when he first refused to step forward we would not only thwart the intention of these regulations, but we would also unnecessarily exacerbate what is already a highly sensitive area in the administration of criminal justice."

Chernekoff v. United States, 219 F. 2d 721 (9th Cir. 1955), cited in *Kroll,* is also important here. Chernekoff, like Gutknecht, was given no opportunity to go through the standard procedures for refusal of induction. In reversing the conviction, the court held, 219 F. 2d at 724-725:

"Reversal is also required because the appellant never refused to be inducted into the Armed Forces in the manner required by law in order to warrant prosecution.

"Appellant reported to the induction station as required by 32 Code Fed. Regs. § 1632.14(a). ... As 32 Code Fed. Regs. § 1632.16 does not prescribe any method for induction, the Department of the Army has specified the procedure to be followed in Special Regulation 615-180-1.

"One purpose of this regulation is self-evident. It is intended to give a registrant a last clear chance to change his mind and accept induction rather than certain indictment and possible conviction for a felony.... *The regulation is couched in mandatory, not discretionary, language.* [emphasis supplied.]

"In the present case the appellant was not given the prescribed opportunity to step forward, nor the prescribed warning. The Army deemed it useless ***74** to apply the Special Regulation to the appellant as he had said he would not if asked to do so step forward and become inducted into the Armed Forces. It does not matter that he might not have changed his mind. He should have been given the opportunity granted him by the Army's own regulation to seriously reflect and to let actions speak louder than words.... It is also important that the moment he become liable for civil prosecution by marked with certainty. The Special Regulation fulfills such a need."

In reference to a written statement of refusal, the court in *Chernekoff* declared:

"It amounts to no more than testimony that someone heard appellant say he would refuse to be inducted except that a statement in writing is more easily proved."

See also *Parrott v. United States,* 370 F. 2d 388, 395 (9th Cir. 1966) and *Edwards v. United States,* 295 F. 2d 453 (9th Cir. 1968).

The obvious conflict between the decision in this case below and the decision in *Chernekoff* must be resolved. Acceptance of the *Chernekoff* rule will result in the elimination of any ambiguity about the intentions or acts of the draftee.

In the opinion below, the court of appeals did not go into the question of intent or of the exact moment of the commission of the crime of refusal. The opinion draws on ambiguous language from *Billings v. Truesdell,* 321 U.S. 542, 557 (1944). Of course, as asserted ***75** by the quotation from *Billings* cited by the Court of Appeals, a draftee who reports to the induction center and refuses induction is as guilty as a draftee who does not report at all. But the criminal acts to be proved are different in each case. And, of course, the issue in this case is whether the petitioner did in fact refuse induction, whereas the issue in *Billings* was whether the defendant could be inducted against his will and tried under military law. There was no issue in *Billings* of the proper procedure to be followed by the Army to enable proof of commission of the offense and proof of intent. Indeed, to the extent that *Billings* insists upon a precise demarcation between civilian and military status, it supports the argument made above.

The opinion of the district court treated the issue of the crucial one step forward at greater length, but misconstrued the meaning of the induction ceremony. The district court opinion alleged that the petitioner was not "charged with failure to take 'one step forward,' but with failure to comply with the Board's order to report for, and submit to, induction." The district court is simply confused as to what constitutes induction. It is clear from AR 601-270(37)(1) that the one step forward *constitutes* induction. Thus, the petitioner was in fact charged with failure to take "one step forward," *i.e.,* with failure to submit to induction.

No doubt the conjunctive phrasing of the indictment (discussed at point III, *infra*) contributed to the confusion of the court below. In charging the petitioner ***76** with failure "to report for and submit to induction," the government made the petitioner's task in defending himself at trial quite difficult. It is simply not clear from the indictment whether the petitioner was charged with failure to report, refusal to submit, or both, and both courts below may have been misled by the indictment.

The opinion of the District Court also misconstrued the significance of the alleged refusal to take the prescribed mental and physical tests. With no basis whatsoever for its statement, the court declared that it "appears" that the one-step-forward procedure was not followed *because* the petitioner allegedly refused to take the physical and mental tests. As argued above, if it were felt that an alleged refusal to take the tests prevented the Army from attempting to induct the petitioner, then he should have been charged with failure to obey the orders of Army personnel at the center and not with refusing induction. See 50 App. U.S.C.A. § 462(a) and 32 C.F.R. § 1632.14(b). Indeed, the only cases in which the Army regulations concerning induction procedures would not apply is where the defendant failed to report to the induction center as in *United States v. Kurki,* 384 F. 2d 905 (7th Cir. 1967), *cert. den.,* 390 U.S. 926 (1968).

Because the government proved neither that the defendant failed to report for induction nor that he refused to submit to induction, because there is a fatal variance between the indictment and the government's proof at trial, and because the military authorities failed to follow their own procedural regulations in processing petitioner for induction, the conviction should be reversed.

***77** III. THE INDICTMENT IN THIS CASE FAILS TO STATE AN OFFENSE AGAINST THE UNITED STATES IN THAT IT IS BAD FOR DUPLICITY.

The indictment in this case charged that petitioner "did fail and neglect to comply with an order of his local board to

report for and submit to induction into the armed forces." (Appendix, p. 2). By timely motion, petitioner's trial counsel challenged the indictment as duplicitous in that it charged two offenses in a single count, which motion was denied (Appendix, p. 4).

Claims that a single count of an indictment states more than one offense, in violation of F.R. Crim. P. 8(a)'s requirement that offenses be pleaded "in a separate count for each offense," run into conceptual difficulty most often because of the federal practice of conjunctive pleading[FN33] and the plethora of federal statutes proscribing a "course of conduct" rather than a single act. *E.g., United States v. Universal C.I.T. Credit Corp.,* 344 U.S. 218, 224 (1952). However, refusals to report for or to submit to induction do not involve a "course of conduct," and we are left only with the view of the courts below that the indictment in the case at bar alleges only different ways of committing one underlying offense: the failure to obey the board's order to report and submit.

> FN33. F. R. Crim. P. 7(c) permits pleading in the alternative in limited situations. An indictment in the disjunctive is bad for uncertainty.

Petitioner turns to an examination of this contention, for clearly if the indictment does allege two offenses, this conviction cannot stand. See *e.g., Bins v. United States,* 331 F. 2d 390, 392-93 (5th Cir. 1964); 8 ***78** Moore, Federal Practice § 8.03 (Cipes ed.--Crim. Rules).

When a registrant's name is reached for induction, the board sends him an order to report, SSS Form 252, setting out the date, time and place at which he is to report. If the registrant fails to report as ordered, he is guilty of an offense. See, *e.g., United States v. Rabb,* 394 F. 2d 230 (3d Cir. 1968). If he reports and fails to obey the directions of those in charge of his processing, he may have committed an offense under 32 C.F.R. § 1632.14(b)(1969) as discussed in Point II, *supra.* If he reports and is found finally acceptable, refuses to step forward when his name is called, and persists in this refusal, he may also be guilty of an offense. See Point II, *supra.* Excluding from consideration the failure to obey directions at the induction center, clearly the refusal to report and the refusal to submit are separate crimes having quite different elements and raising quite different problems not only of proof but of defense. One who fails to report for induction may be precluded from raising any defenses concerning alleged errors in his processing by the board or the armed forces, or the lack of a basis in fact for his classification. See *McKart v. United States,* .... U.S. .... (1969). His state of mind may be open to far broader inquiry than in the typical case of refusal to submit to induction. See, *e.g., United States v. Rabb, supra,* Sel. Serv. L. Rep., Practice Manual ¶ 2452.

By contrast, trials for refusal to submit to induction are typically routine considerations of alleged errors committed by the local board. There is almost never a question that the defendant did refuse to submit, nor any question that he knew what he was doing when ***79** he refused. Generally, he will be doing no more than *Clark v. Gabriel,* 393 U.S. 256 (1968) said he must: laying the basis for judicial review of the actions of his draft board.

Nor is this a case in which alternative methods of committing the same offense must be pleaded in order to avoid a variance between indictment and proof. The question is whether the two quite disparate crimes of refusal to report and refusal to submit can be treated as but aspects of a single offense. Logically, the answer is no, and there are no considerations of governmental convenience which justify treating them in such a fashion.

More than practical wisdom and matters of convenience establish the insufficiency of the indictment, however. The sixth amendment apprisal requirement is mocked by a rule permitting the government to plead draft refusal offenses in inconsistent and essentially uninformative terms. Point II, *supra,* shows how the confusion arising from failure to plead with precision prejudiced the defendant at trial: that argument shows how petitioner was indicted for refusal to report and for refusal to submit, and tried for neither offense. Here it is suggested that the prosecutor's failure to live up to the rule in *Russell v. United States,* 369 U.S. 749 (1963), contributed to that unhappy state of events. The indictment in this case hardly permits a reviewing Court to "decide whether [the facts alleged] are sufficient in law to support a conviction." 369 U.S. at 768. While the grand jury minutes are not part of the record in this case, the opaque prose of the indictment raises, as in *Russell,* the real possibility that the petitioner was "convicted on the basis of facts not found by, and perhaps***80** not even presented to, the grand jury which indicted him." In short, this indictment does not "state the species ... descend to particulars" in defining the alleged offense, and is therefore infirm.

Drawing upon the underlying theme of *Russell*--the importance of one element of the charged offense (there contempt of Congress under 2 U.S.C. § 192)-- another weighty consideration comes into play in this case. *Billings v. Truesdell,* 321 U.S. 542 (1944), interpreted and emphasized the crucial difference between the penalty provisions of the 1917 and 1940 draft acts: The 1940 Act, in contrast to that of 1917, envisaged a clear line of demarcation between military and civilian status. The Army regulations construed in *Billings* carried out that Congressional intention that the line be clearly drawn. Cases such as *Estep v. United States,* 327 U.S. 114 (1946), gave the line a crucial significance in the law of selective service. The refusal to submit to induction--a potential crime committed right at the line to which the 1940 Act, *Billings* and *Estep* give such importance--is thus a completely different offense from the refusal to show up at the induction center at all. See also the renewed Congressional affirmation of the important distinction between the two offenses, Military Selective Service Act of 1967 § 10(b)(3), 50 U.S.C. App. § 460(b)(3); *Oestereich v. Selective Service Board,* 393 U.S. 233 (1968).

This legislative and judicial construction of the law reinforces the view that refusal to report and refusal to submit are entirely separate offenses which must be pleaded as such in separate counts of the indictment. The indictment in the present case sweeps them into ***81** the same count and is therefore bad for duplicity, which is perhaps another way of saying that it fails to state an offense.

Conclusion.

For the foregoing reasons, it is respectfully prayed that the judgment of the court of appeals be reversed and the cause remanded with directions to order dismissal of the indictment or, if Point II is reached and decided favorably to petitioner, entry of a judgment of acquittal.

Appendix not available.

Gutknecht v. U.S.
1969 WL 119856 (U.S.) (Appellate Brief)

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